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o. 85-162-CSY
tatus: GRANTED

Title: New Mexico, Petitioner
v.
Ralph Rodney Earnest

ocketed:
une 19, 1985

Court: Supreme Court of New Mexico

Counsel for petitioner: McEuen,William, Bardacke,Paul

Counsel for respondent: Sullivan,J. Thomas

ntry	Date	Note	Proceedings and Orders
1	May 9 1985		Application for extension of time to file petition and order granting same until June 19, 1985 (White, May 10, 1985).
2	Jun 19 1985	G	Petition for writ of certiorari filed.
3	Aug 2 1985		Brief of respondent Ralph Rodney Earnest in opposition filed.
4	Aug 2 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
5	Aug 7 1985		DISTRIBUTED. September 30, 1985
7	Oct 7 1985		REDISTRIBUTED. October 11, 1985
9	Oct 15 1985		REDISTRIBUTED. October 18, 1985
10	Oct 21 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED.
11	Oct 21 1985		Petition GRANTED.
			**********
13	Nov 25 1985		Order extending time to file brief of petitioner on the merits until December 13, 1985.
16	Dec 9 1985		Record filed.
17	Dec 9 1985		Certified copy of original record and tapes received.
18	Dec 13 1985		Brief of petitioner New Mexico filed.
19	Dec 13 1985		Joint appendix filed.
20	Dec 13 1985		Brief amicus curiae of Indiana, et al. filed.
22	Jan 6 1986		Order extending time to file brief of respondent on the merits until January 27, 1986.
23	Jan 23 1986		Brief of respondent Ralph Rodney Earnest filed.
24	Jan 27 1986		Brief amicus curiae of NM Public Defender Department filed.
25	Jan 27 1986		Brief amicus curiae of ACLU, et al. filed.
26	Feb 4 1986		SET FOR ARGUMENT, Tuesday, April 1, 1986. (1st case)
27	Feb 11 1986		CIRCULATED.
28	Mar 6 1986	X	Reply brief of petitioner New Mexico filed.
29	Mar 12 1986		One envelope of tapes received.
30	Apr 1 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

Office-Supreme Court, U.S.
FILED
JUL 19 1985
ALEXANDER L. STEVAS,
CLERK

85-162

No. _____

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF NEW MEXICO,
Petitioner,

v.

RALPH RODNEY EARNEST,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

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June, 1985

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QUESTION PRESENTED

Does the Sixth Amendment require the exclusion at trial of an uncross-examined hearsay statement without regard to its indicia of reliability?

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No. _____

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF NEW MEXICO,
Petitioner,

v.

RALPH RODNEY EARNEST,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW MEXICO

The petitioner, State of New Mexico, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the New Mexico Supreme Court entered in this proceeding on March 4, 1985.

OPINION BELOW

The opinion of the New Mexico Supreme Court, not yet reported, appears in Appendix A.

JURISDICTION

The judgment of the New Mexico Supreme Court was entered on March 4, 1985. A timely motion for rehearing was denied on March 21, 1985. Petitioner received an extension of time to file this Petition through and including June 19, 1985, in Order No. A-849, by the authority of Associate Justice Byron White, Circuit Justice for the Tenth Circuit wherein petitioner is located. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

Constitution of the United States, Fourteenth Amendment:

". . .[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

On February 12, 1982, the body of David Eastman was found next to a rural highway near Carlsbad, New Mexico. (Tape 10, 9/83, 766-889)[1] Eastman's throat had been cut and he had two gunshot wounds to the head. (Tape 19, 9/83,

[1] Respondent's trial was tape recorded. Petitioner's citations were taken from a Lanier Model P-88/T.

332-347, 406-418) Approximately three hours later, respondent Ralph Rodney Earnest and co-defendants Phillip Boeglin and Perry "Red" Conner were arrested driving Eastman's El Camino pickup. (Tape 10, 9/83, 178-248; Tape 16, 114-116) That afternoon, co-defendant Boeglin requested to speak to the district attorney's staff, and gave a statement describing the homicide of Eastman. (Tape 14, 90-112) The statement was incriminatory as to all three co-defendants, and included Boeglin's confession to cutting Eastman's throat and Boeglin's statement that respondent had fired one of the bullets which struck Eastman in the head. (State's Exhibits No. 39 and No. 39A)

Respondent's first trial resulted in a mistrial. Prior to respondent's second trial, counsel for petitioner and respondent argued the admissibility of Boeglin's statement. Petitioner argued that Boeglin's statement was a statement against penal interest as defined by Rule 804(b)(4) of the New Mexico Rules of Evidence. The trial court noted that Boeglin's statement was strongly self-incriminatory, and took note of the corroborating evidence from the first trial, but reserved a final ruling until admission was moved at trial. (Tape 2, 5-95, 718-758)

The state called Boeglin to the stand but he refused to answer questions concerning his activities on February 11, 1982, citing his privilege against self-incrimination. (Tape 11, 457-469) At the state's request, the trial court granted use immunity to Boeglin, but he again refused to testify. (Tape 11, 477-513) The trial judge explained to Boeglin that his privilege against self-incrimination did not allow him to refuse to testify in the face of a grant of use immunity, warned him that further refusals would be punished as contempt of court, and ordered him to testify. Boeglin continued his refusals. (Tape 12, 526-578) He was cited for contempt and excused from the witness stand. (Tape 12, 578-592) The state moved the trial court to declare Boeglin unavailable pursuant to Rule 804(a)(2) of the

New Mexico Rules of Evidence, and the motion was granted. (Tape 12, 601–606; Tape 13, 143-145)

The state then called Dennis DeLuche, an investigator for the district attorney's office. DeLuche described receiving a message several hours after Boeglin's arrest on February 12, 1982, indicating that Boeglin wished to speak to him. (Tape 14, 90-112) He described taping the subsequent statement and authenticated a tape and a transcript of that tape. (Tape 14, 107-153) They were admitted as State's Exhibits No. 39A and No. 39, respectively. State's Exhibit No. 39A was played for the jury, which was allowed to follow the tape on Exhibit No. 39, after being cautioned to rely upon the tape rather than the transcript. (Tape 14, 246-255)

Respondent was convicted of murder, conspiracy to commit murder, kidnapping, conspiracy to distribute controlled substances, and possession of controlled substances. He received consecutive sentences amounting to life imprisonment, plus twenty-two years and six months. He appealed his convictions to the New Mexico Supreme Court, arguing, among other things, that the admission of Boeglin's statement violated his right to confront witnesses pursuant to the Sixth and Fourteenth Amendments of the Constitution of the United States.

Petitioner argued on appeal that admission of Boeglin's statement was governed by the standards of *Ohio v. Roberts*, 448 U.S. 56 (1980). Petitioner argued that the declarant was unavailable, that the statement against penal interest exception was a firmly rooted exception to the hearsay rule, and that the corroborating evidence and other circumstances amounted to particularized guarantees of trustworthiness. (State's Answer Brief, pp. 15-28)

The New Mexico Supreme Court reversed respondent's convictions, holding that admission of Boeglin's testimony amounted to a denial of confrontation. That Court agreed that Boeglin

was unavailable, but refused to apply the indicia-of-reliability test from *Ohio v. Roberts, supra,* to the statement. The Supreme Court of New Mexico ruled that *Roberts* supports only the admission of prior judicial statements or testimony, citing *United States v. Rothbart*, 653 F.2d 462 (10th Cir. 1981). That Court further ruled that the absence of an opportunity for full cross-examination renders admission of a statement violative of confrontation rights, citing *United States v. Allen*, 409 F.2d 611 (10th Cir. 1969). The Supreme Court of New Mexico held that this case was controlled by *Douglas v. Alabama*, 380 U.S. 415 (1965), which required a finding that respondent's right of confrontation was violated. Petitioner's motion for rehearing on this issue was denied without specification of reasons.

REASONS FOR GRANTING THE WRIT

1. The Opinion Below Raises Significant And Recurring Problems Concerning The Relationship Between The Rule Against Hearsay And The Confrontation Clause Of The Sixth Amendment.

The New Mexico Supreme Court's opinion in this case illustrates the continuing problems arising from the necessity for reconciling hearsay evidence, which may be reliable, with the requirement of confrontation of witnesses. Central to this problem is the need for further guidance from this Court concerning whether the indicia-of-reliability test described generally in *Ohio v. Roberts* can satisfy the necessities of the Confrontation Clause, absent *any* form of cross-examination. In that context, the present case poses the following question:

(1) Does *Ohio v. Roberts* authorize the admission of uncross-examined, extrajudicial statements from an unavailable declarant if such statements fall within a firmly rooted exception to

the hearsay rule, or are shown to have particularized guarantees of trustworthiness?

This Court's opinion in *Ohio v. Roberts* sets forth a "general approach" to the task of reconciling hearsay exceptions with the requirements of confrontation, by allowing an inquiry into the indicia of reliability surrounding the statement at issue. 448 U.S. at 65-66. However, this Court's opinion in *Roberts* also emphasized that its approach to this problem is a cautious, step-by-step attempt to accommodate the important competing interests necessarily implicated in such questions. 448 U.S. at 64-65; 448 U.S. at 66, n.9. Thus, an appellate court may be tempted to read *Roberts* very narrowly and restrict it to its facts, as the New Mexico Supreme Court did in this case. The statements at issue in *Roberts* had been given in a prior judicial proceeding where they had been tested by the equivalent of significant cross-examination. 448 U.S. at 70. It is therefore necessary that this Court address itself to such an analysis in the factual context of an uncross-examined, extrajudicial statement in order to take the next step in defining the scope of the indicia-of-reliability test most recently refined in *Roberts*. It is important to note that this Court has not spoken concerning the limits of the indicia-of-reliability test since *Roberts*, yet many Courts have applied that test to factual contexts quite distinct from those at issue in *Roberts*. *E.g.*, *United States v. Katsougrakis*, 715 F.2d 769 (2nd Cir.), *cert. denied*, 104 S.Ct. 704 (1984) (out-of-court statements against penal interest; *United States v. Ammar*, 714 F.2d 238 (3rd Cir.), *cert. denied*, 104 S.Ct. 344 (1984) (out-of-court statement by co-conspirator); *Haggins v. Warden*, 715 F.2d 1050 (6th Cir.), *cert. denied*, 104 S.Ct. 980 (1984) (excited utterances); *United States v. Layton*, 720 F.2d 548 (9th Cir.), *cert. denied*, 104 S.Ct. 1423 (1984) (out-of-court statements against penal interest); *Williams v. Melton*, 733 F.2d 1492 (11th Cir.), *cert. denied*, 53 U.S.L.W. 3415 (1984) (out-of-court statement under Georgia's res gestae rule). Thus, the issue is a recurring one, and this case presents

this Court with an appropriate factual context in which to address the applicability of the indicia-of-reliability test to extrajudicial, uncross-examined statements.

The opinion below also illustrates a seeming inconsistency between early confrontation cases, such as *Douglas* and its companion case, *Pointer v. Texas*, 380 U.S. 400 (1965), and later cases such as *California v. Green*, 399 U.S. 149 (1970), *Mancusi v. Stubbs*, 408 U.S. 204 (1972), and *Roberts*. The New Mexico Supreme Court in the opinion below refused to inquire as to the indicia of reliability of Boeglin's statement because it believed that *Ohio v. Roberts* was limited to its facts, and because it believed that *Douglas v. Alabama* was indistinguishable and mandated exclusion of Boeglin's statement on confrontation grounds.

Douglas speaks in terms of a "right of cross-examination secured by the Confrontation Clause." 380 U.S. at 419. That case, like the present case, makes no attempt to analyze the challenged statement for indicia of reliability which might afford an adequate basis for evaluating the truth of the statement. Instead, *Douglas* seems to equate confrontation with cross-examination.

Green, *Mancusi*, and *Roberts* were also cases where there was no cross-examination at trial. But instead of finding a violation of confrontation rights, those cases analyzed the circumstances of the statements and found sufficient indicia of reliability to adequately meet the interests of confrontation. However, in each of those cases, the statements had received at least the equivalent of cross-examination in a *prior* judicial proceeding.

This case presents this Court with an opportunity to clarify whether *Douglas* requires the automatic rejection of extrajudicial, uncross-examined statements by unavailable declarants or whether the more flexible indicia-of-reliability analysis of

Roberts is now to be applied to such statements.[2] It is important to the continued orderly development of confrontation analysis that this next step be taken by this Court.

2. **The Opinion Below Conflicts With Federal And State Appellate Court Decisions Which Allow Admission Of Uncross-examined, Extrajudicial Statements Over Confrontation Clause Challenges Where The Statements Bear Adequate Indicia Of Reliability.**

Ohio v. Roberts, supra, states that:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

448 U.S. at 66 (footnote omitted).

Roberts involved the admission of preliminary hearing testimony which had been tested with the equivalent of significant cross-examination at the preliminary hearing. 448 U.S. at 70. Because of this, the transcript from the preliminary hearing was found to have sufficient indicia of reliability to survive a confrontation challenge. 448 U.S. at 73.

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[2] *Dutton v. Evans,* 400 U.S. 74 (1970), dealt with an uncross-examined, extrajudicial statement by an unavailable declarant. However, this Court noted pointedly in *Dutton* that the statement at issue there was neither crucial nor devastating evidence in that case, 400 U.S. at 87. Here, the statement at issue was assuredly devastating to the defense and very important to the prosecution's case.

The opinion below limited *Roberts* strictly to its facts, ruling that its indicia-of-reliability inquiry is applicable only to prior judicial testimony or statements, and holding that there must be an adequate opportunity for cross-examination to meet the requirements of the Confrontation Clause.

That holding conflicts with several appellate decisions from state and federal courts which have applied the indicia-of-reliability analysis from *Roberts* to support the admission of uncross-examined, extrajudicial statements from declarants unavailable at trial.

The Second Circuit has applied the indicia-of-reliability test from *Roberts* to statements against penal interest made by an arsonist, which also implicated the person who hired him in *United States v. Katsougrakis,* 715 F.2d 769 (2nd Cir.), *cert. denied,* 104 S.Ct. 704 (1984). The statements at issue there were made at a hospital by a declarant who died a few days later. The statements were never subjected to any form of cross-examination, nor was any such opportunity ever afforded to the defendant. The Second Circuit did not deem the lack of cross-examination to be dispositive, but instead analyzed the statement in terms of the applicability of a firmly rooted hearsay exception and the presence of corroboration confirming the trustworthiness of the statement. The statement was found admissible on both grounds.

The Fourth Circuit has also applied the *Roberts* criteria to support the admissibility of uncross-examined, extrajudicial statements. In *United States v. Lisotto,* 722 F.2d 85 (4th Cir.), *cert. denied,* 104 S.Ct. 1682 (1984), the admission of dually inculpatory statements from fugitive co-defendants was challenged on Sixth Amendment confrontation grounds. In spite of the lack of any opportunity to cross-examine, the Fourth Circuit applied *Roberts,* and determined whether the declarants were unavailable and the statements reliable. Upon finding that those criteria were met, the Fourth Circuit ruled that

there was no denial of confrontation in admitting the statements.

Likewise, the opinion below conflicts with the approach taken by the Supreme Court of Washington. In *State v. Parris,* 654 P.2d 77 (Wash. 1982), the Washington Supreme Court applied the *Roberts* criteria to uncross-examined, extrajudicial statements against penal interest by a declarant who refused to testify. Finding that the penal interest exception was a firmly rooted exception to the hearsay rule, and that the statements were accompanied by particularized guarantees of trustworthiness, the Supreme Court of Washington held there was no denial of Sixth Amendment confrontation rights.

3. The Decision Below Is Incorrect.

The trend in confrontation analysis, clearly shown by *Roberts, Mancusi, Dutton,* and *Green,* is to use a flexible approach designed to adequately accommodate the competing interests of confrontation, effective law enforcement, and the development of local evidentiary law. *See Roberts,* 448 U.S. at 64-65. The opinion below would reverse that trend and require an opportunity to cross-examine declarants as to any statements introduced at trial. Such a policy carries with it the danger that the rule against hearsay would be elevated to constitutional status, with the sole exception of prior judicial testimony from a proceeding where there had been an opportunity for cross-examination at the prior judicial proceeding. The danger of such a policy was pointed out by Justice Harlan in his concurring opinion in *California v. Green.* It would paralyze the development of evidentiary law and would prevent the admission of obviously reliable evidence. The *Roberts* opinion recognizes those concerns and incorporates them into its analysis. 448 U.S. at 64-65. The opinion below ignores those interests, and would have them play no part in

confrontation analysis.[3] The opinion below conflicts in principle with *Roberts, Mancusi* and *Green,* and is therefore incorrect.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the New Mexico Supreme Court.

Respectfully submitted,

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[3] It should also be noted that the opinion below relies solely upon *United States v. Rothbart, supra,* as its authority for limiting the applicability of *Roberts* to cross-examined prior judicial testimony. *Rothbart* does not purport to address that issue, confining itself solely to the issue of whether the declarant was actually shown to be unavailable. 653 F.2d at 466.

APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,

v.

RALPH R. EARNEST,
Defendant-Appellant.

No. 15,162

Supreme Court
of New Mexico
FILED
March 4, 1985
Rose Marie
Alderete

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY

OPINION

RIORDAN, Justice.

Ralph Rodney Earnest (defendant), Phillip Boeglin (Boeglin), and Perry Connor (Connor) were charged with murder, conspiracy to commit murder, kidnapping, conspiracy to distribute a controlled substance (methamphetamines), and possession of a controlled substance (methamphetamines). Defendant, Boeglin, and Connor were each tried separately. During the course of defendant's trial before a jury, a mistrial was declared. Defendant was subsequently retried, convicted on all counts and sentenced to life imprisonment for the murder, eighteen years for conspiracy to commit murder (with nine years suspended), nine years for kidnapping, eighteen months for conspiracy to distribute a controlled substance and three years for possession of a controlled substance. All of these sentences were to run consecutively to each other and consecutively to the life sentence. From this judgment and sentence, defendant appeals. We reverse and remand for a new trial.

The issues we address are:

I. Whether the trial court erred in subjecting defendant to a retrial after defendant's first trial ended in a mistrial.

II. Whether the trial court erred in refusing defendant's request for a hearing on his motion to dismiss the indictment on double jeopardy grounds or refusing to grant an interlocutory appeal on this issue.

III. Whether admission of the prior statement of co-defendant Boeglin violated defendant's right to confront the witness against him.

IV. Whether the prosecutor's reference to defendant's post-arrest silence deprived defendant of a fair trial.

V. Whether the trial court erred in allowing the district attorney's investigator to testify as to co-defendant Boeglin's behavior at the time of his confession.

VI. Whether the trial court erred in ordering the attorney for co-defendant Connor to testify in rebuttal to Connor's testimony where the attorney/client privilege was never waived.

We find it unnecessary to address a seventh issue raised on appeal since it is unlikely to become a factor on retrial.

Facts.

The offenses charged were committed on the night of February 11, 1982 and the early morning hours of February 12, 1982. Defendant and his two co-defendants were arrested on the morning of February 12, 1982. On that same day, co-defendants Boeglin and Connor both gave statements to police

officers. Each of these statements was tape recorded and subsequently transcribed. Boeglin's statement describes the events leading up to and including the murder. It incriminates defendant, Boeglin, and Connor.

I. Declaration of Mistrial.

Defendant's first trial ended when the trial court declared a mistrial. The order declaring mistrial indicates the mistrial was granted pursuant to defendant's motion and a finding that "manifest necessity" existed for a mistrial. In declaring a mistrial in this manner, the court retained jurisdiction to retry defendant.

Defense counsel, prior to the declaration of mistrial, had twice moved for mistrial. The trial court had reserved ruling and had taken these motions under advisement. After defendant's first motion for mistrial, the trial court cautioned defense counsel that defendant would be better off continuing with the trial and seeking a directed verdict, instead of moving for mistrial and facing a retrial. Despite this advice, defense counsel chose to stand on the motion. Later in the proceedings, defense counsel again moved for mistrial, and again the trial court noted that defense counsel was placing defendant in a situation where he could be retried rather than acquitted and dismissed if a directed verdict was granted. Despite these repeated warnings from the bench, defense counsel made no attempt to withdraw either of the motions for mistrial. Later, when the trial court announced that it was declaring a mistrial based on defense counsel's previous motions, defense counsel attempted to withdraw the previous mistrial motions. Defense counsel argued that a mistrial was inappropriate in light of the state of the evidence and reminded the trial court that it had previously indicated the appropriateness of directing a verdict. The trial court responded that defense counsel had been warned that the outstanding motions for mistrial were not in defendant's

best interest because, at the time when they were made, the State had not shown all of the elements of any of the offenses charged.

It is the general rule that "[a] mistrial not moved for or consented to by the defendant must be based upon a manifest necessity or jeopardy attaches preventing retrial." *State v. Castrillo*, 90 N.M. 608, 613, 566 P.2d 1146, 1151 (1977). "Different considerations obtain, however, when the mistrial has been declared at the defendant's request." *U.S. v. Dinitz*, 424 U.S. 600, 607 (1976). In this event, "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution." *U.S. v. Jorn*, 400 U.S. 470, 485 (1971). In the instant case, defense counsel had made two motions for mistrial prior to the time the trial court declared a mistrial. Therefore, it was not error to subject defendant to a second trial.

On appeal, defendant asserts that defense counsel effectively withdrew the two motions for mistrial. We disagree. Defense counsel knew that a directed verdict and acquittal were possible for defendant. Defense counsel was twice warned of the results if the mistrial motions were maintained. Yet, having persisted in his requests for mistrial, defendant now complains of the results obtaining from such motions. We hold that defense counsel was given ample opportunity prior to the declaration of mistrial to withdraw the motions and failed to do so. *See U.S. v. Crouch*, 566 F.2d 1311 (5th Cir. 1978).[1]

Defendant asserts that no manifest necessity existed. Again we disagree. "It is a well settled rule . . . that the requisite manifest necessity which prevents a declaration of mistrial from barring reprosecution will generally be found where the mistrial is declared at the request of the defendant." *MacPherson v. State*, 533 P.2d 1103, 1104 (Alaska), *cert. denied*, 423 U.S. 871 (1975). In the instant case, defense counsel twice moved for mistrial, twice ignored warnings from the bench regarding the

effects of such motions, and failed to withdraw those motions. Defense counsel's motions provided the "manifest necessity" required to declare a mistrial. Thus, defendant was properly subjected to retrial.

II. Failure to Grant Hearing or Interlocutory Appeal.

Defendant asserts that he was entitled, prior to his retrial, to a hearing or an interlocutory appeal regarding his motion to dismiss on double jeopardy grounds. *State v. Mestas*, 93 N.M. 765, 605 P.2d 1164 (Ct.App. 1980), demonstrates that the Court of Appeals has authority to accept such an application for interlocutory appeal. Therefore, defendant could have filed an interlocutory appeal with the Court of Appeals following the trial court's denial of his motion to dismiss. However, the record does not show that defendant ever made such an attempt. Thus, defendant waived any right he may have had to an interlocutory appeal on this issue. Regardless, we hold that it was not in error to retry the defendant.

III. Admission of Co-defendant's Statement.

The State called co-defendant Boeglin to testify against defendant. Boeglin refused to testify on Fifth Amendment grounds, and the trial court granted him use immunity for his testimony. However, despite this grant of immunity, Boeglin still refused to testify and was found in direct contempt by the trial court. The State then moved to have Boeglin declared unavailable as a witness. This motion was granted over defense objection. The trial court then allowed Boeglin's taped statement to be played before the jury and allowed the jury to use individual transcripts of the statement to better follow the taped statement. Defendant objected that the use of the statement was a violation of defendant's right to confront the witness and engage in meaningful cross-examination. Over this objection, the statement was presented to the jury.

It is clear in the instant case that Boeglin was unavailable to testify. NMSA 1978, Evid.R. 804(a)(2) (Repl.Pamp. 1983).

Defendant relies on *Douglas v. Alabama,* 380 U.S. 415 (1965), in support of his claim that admission of Boeglin's statement violated his right to confront and cross-examine the witness. We find *Douglas v. Alabama* directly on point. There, an accomplice was called as a state's witness and refused to testify on Fifth Amendment grounds. The accomplice had previously confessed to the crime, and such confession implicated Douglas. The state was allowed, in the jury's presence, to read the confession. Douglas was found guilty. On appeal, it was held that Douglas' right to confront and cross-examine the witness against him had been violated.

In support of the admission of Boeglin's prior statement, the State relies on *Ohio v. Roberts,* 448 U.S. 56 (1980). There, the Supreme Court fashioned a test whereby prior statements could be admitted if: (1) the witness is unavailable, and (2) the prior statement bears adequate indicia of reliability, in that it falls within one of the "firmly rooted" exceptions to the hearsay rule, or the statement has particularized guarantees of trustworthiness. *Id.* at 66. Under the facts of *Ohio v. Roberts,* the prior statement sought to be introduced had been made at a preliminary hearing where an opportunity to cross-examine the witness existed. It is in this sense that the instant case (and *Douglas v. Alabama)* are distinguishable from *Ohio v. Roberts.* Two 10th Circuit Court of Appeals' opinions help to clarify this distinction.

In *U.S. v. Allen,* 409 F.2d 611 (10th Cir. 1969), it was determined that the proper test in deciding whether transcipts of preliminary hearing testimony could be properly admitted at trial (where the witness refused to testify) was *opportunity* for full and complete cross-examination of that witness at the preliminary hearing. *Id.* at 613. Thus, it can be logically inferred that where no such opportunity to cross-examine

the witness existed, then admission of a prior statement is a denial of a defendant's confrontation rights.

Further, in *U.S. v. Rothbart,* 653 F.2d 462, 465 (10th Cir. 1981), the Court, in discussing the *Ohio v. Roberts* test for admission of prior statements, limits its application to statements and/or testimony made at an earlier *judicial proceeding.*

In the instant case, Boeglin's prior statement made to police officers shortly after his arrest was not made during the course of any judicial proceeding and defendant was in no way afforded an opportunity to cross-examine Boeglin. We therefore determine that admission of Boeglin's prior statement was highly prejudicial, violated defendant's confrontation rights, and deprived defendant of meaningful cross-examination. Defendant's conviction is therefore reversed and the case remanded for a new trial.

In so holding, we adopt the 10th Circuit Court of Appeals' interpretation in *Rothbart* of *Ohio v. Roberts,* which limits admission of prior statements to those that were made at an earlier judicial proceeding where the defendant was given the opportunity to fully cross-examine the witness against him.[2]

IV. Prosecutor's Reference to Defendant's Silence.

As his fourth contention on appeal, defendant argues that he was denied a fair trial in that the prosecutor erroneously inquired into defendant's post-arrest silence while cross-examining the defendant. We disagree.

The evidence indicates that the prosecutor's references to defendant's silence were prompted by earlier implications made by defense counsel that defendant had always maintained his innocence. This being the case there was no error. *State v. Molina,* 101 N.M. 146, 679 P.2d 814 (1984).

V. Admission of Investigator's Testimony.

Boeglin's statement was admitted through an investigator for the Eddy County District Attorney's office who was present at the time Boeglin made the statement. The prosecution asked the investigator if he had formed an opinion as to Boeglin's state of mind at the time Boeglin made the statement. Defense counsel objected on the ground that the witness was not properly qualified as an expert. The objection was overruled. The investigator then testified that Boeglin had appeared "hyper."

On appeal, defendant asserts that the investigator was unqualified under NMSA 1978, Evid. Rule 702 (Repl.Pamp. 1983), to give an expert opinion regarding Boeglin's state of mind. However, defendant ignores the effect of NMSA 1978, Evid. Rule 701 (Repl.Pamp. 1983). That Rule allows admission of lay testimony in the form of opinions that are rationally based upon the witness's perceptions. Thus, the investigator's testimony was properly admitted.

VI. Waiver of Attorney-Client Privilege.

As the last point of error, defendant asserts that the trial court erred in ordering the attorney for co-defendant Connor to give rebuttal testimony to Connor's testimony. NMSA 1978, Evid. Rule 503(c) (Repl.Pamp. 1983), bars defendant's claim. Connor waived the privilege when he testified regarding what he did *not* tell his attorney. Defendant may not assert another's privilege.

Conclusion.

We determine that admission of co-defendant Boeglin's prior statement constitutes reversible error, and defendant's

convictions for murder, conspiracy to commit murder, and kidnapping are set aside and he is granted a new trial.

IT IS SO ORDERED.

/s/ William Riordan
WILLIAM RIORDAN, Justice

WE CONCUR:

DAN SOSA, JR., Senior Justice

/s/ Mary C. Walters
MARY C. WALTERS, Justice

FOOTNOTES

[1] We in no way create a rule requiring the trial court to inquire of defense counsel whether they wish to stand on their previous mistrial motions or requiring the trial court to warn defense counsel of the effects of their previous mistrial motions.

[2] *State v. Martinez*, 99 N.M. 353, 658 P.2d 428 (1983) (a case similar to the instant case), is distinguishable on its facts since the witness against Martinez later testified at trial, and Martinez was given an opportunity to cross-examine the witness.

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Thursday, March 21, 1985

NO. 15,162

STATE OF NEW MEXICO,
Plaintiff-Appellee,

vs.

RALPH R. EARNEST,
Defendant-Appellant.

This matter coming on for consideration by the Court upon Motion of Appellee for rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion of Appellee for Rehearing is hereby denied.

ATTEST: A TRUE COPY

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

RECEIVED
Mar 25, 1985
Attorney General

OPPOSITION BRIEF

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
AUG 2 1985
JOSEPH F. SPANIOL, JR.
CLERK

(8)

APPELLATE CLINIC
3315 Daniel
214/692-3562

J. Thomas Sullivan
Director

SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS

July 18, 1985

RECEIVED
JUL 22 1985
OFFICE OF THE CLERK,
SUPREME COURT, U.S.

#85-162

Mr. Alexander Stevas
Clerk of the Supreme Court
Supreme Court of the United States
Washington, D.C. 20543

Re: State of New Mexico v. Ralph Rodney Earnest
No._____

Dear Mr. Stevas,

Enclosed please find the following documents for filing in behalf of Respondent Ralph Rodney Earnest in the above styled cause:

Entry of Appearance by Counsel
Motion for Leave to Proceed In Forma Pauperis
and supporting affidavit
Affidavit of proof of mailing
Affidavit of service
Response to Petition for Writ of Certiorari

Please be advised that because of a problem in the filing of the petition there is no cause number currently assigned to the case, nor have I been provided with the form for entry of appearance usually provided. I believe Bryan Casey is handling this case in your office because of the filing problem.

Thank you for your assistance in this cause.

Sincerely,

J. Thomas Sullivan

Affidavit

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF NEW MEXICO,

Petitioner,

v.

RALPH RODNEY EARNEST,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The undersigned attorney, on behalf of the Respondent, RALPH RODNEY EARNEST, moves that Respondent be allowed to proceed in forma pauperis in this case. Respondent has previously petitioned for writ of certiorari in Earnest v. New Mexico, No. 84-6791, currently pending, and a copy of the original affidavit in support of his in forma pauperis application in that case is attached to this motion.

Respectfully submitted,

J. THOMAS SULLIVAN
ATTORNEY AT LAW
SMU SCHOOL OF LAW
3315 DANIEL
DALLAS, TEXAS 75275
(214)692-3562

ATTORNEY FOR THE RESPONDENT

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1983

RALPH RODNEY EARNEST,

Petitioner,

vs. No.

STATE OF NEW MEXICO,

Respondent.

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

I, RALPH RODNEY EARNEST, being first duly sworn, depose and say that I am the Petitioner, in the above-entitled cause; that in support of my motion to proceed on appeal without being required to prepay fees, costs or give security therefor, I state that because of my proverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present on appeal are stated in the accompanying Petition for Certiorari.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the cost of prosecuting the appeal are true.

1. Are you presently employed? no

A) If the answer is yes, state the amount of your salary or wages per month and give the name and address to your employer.

B) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

Not applicable

---

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

A) If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months.

NA

3. Do you own any cash or checking or savings account? No

A) If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

A) If the answer is yes, describe the property and state its approximate value.

NA

5. List the persons who are dependent upon you for support and state your relationship to those persons.

None

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

Ralph R. Earnest

SUBSCRIBED AND SWORN to before me this 17th day of MARCH, 1985.

OFFICIAL SEAL
CHRIS P. MARTINEZ
NOTARY PUBLIC-STATE OF NEW MEXICO
My Commission Expires 3-21-85

Chris P. Martinez
NOTARY PUBLIC

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

STATE OF NEW MEXICO,
Petitioner,

v.

RALPH RODNEY EARNEST,
Respondent.

AFFIDAVIT OF MAILING

STATE OF TEXAS §
§
COUNTY OF DALLAS §

I, J. Thomas Sullivan, being first duly sworn and deposed according to law, state:

1. I am counsel of record for Respondent in this case and I am a member of the Bar of the United States Supreme Court;

2. On July 18, 1985, within thirty days after receipt of the petition for writ of certiorari in this case, I deposited Respondent's response to the petition in a United States mailbox, properly addressed to the Clerk of the Court and with first-class postage affixed to it.

J. Thomas Sullivan

J. THOMAS SULLIVAN, Affiant
ATTORNEY AT LAW
SMU SCHOOL OF LAW
3315 DANIEL
DALLAS, TEXAS 75275
(214)692-3562

SUBSCRIBED AND SWORN To before me this 18th day of July, 1985.

Sharla Jefferson
NOTARY PUBLIC IN AND FOR
THE STATE OF T E X A S

My commission expires:
4/22/89

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF NEW MEXICO,

Petitioner,

v.

RALPH RODNEY EARNEST,

Respondent.

AFFIDAVIT OF SERVICE

STATE OF TEXAS §
§
COUNTY OF DALLAS §

I, J. THOMAS SULLIVAN, being first duly sworn according to law, depose and say that:

1. I am counsel for the Respondent in this cause and I am a member of the United States Supreme Court Bar.

2. On July 18, 1985, I served a copy of the enclosed response to petition for writ of certiorari upon counsel for Petitioner by depositing same in the United States Mail with first class postage affixed, addressed to the following:

William McEuen
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87504

3. I certify that all parties entitled to service of this pleading have been served by mail.

J. Thomas Sullivan
J. THOMAS SULLIVAN, Affiant
ATTORNEY AT LAW
SMU SCHOOL OF LAW
3315 DANIEL
DALLAS, TEXAS 75275
(214)692-3562

SUBSCRIBED AND SWORN TO before me this 18 day of July, 1985.

Sheila Jefferson
NOTARY PUBLIC FOR THE STATE OF TEXAS

NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF NEW MEXICO,

Petitioner,

v.

RALPH RODNEY EARNEST,

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

J. THOMAS SULLIVAN
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ATTORNEY AT LAW
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RUIDOSO, NEW MEXICO 88345

ATTORNEYS FOR THE RESPONDENT

QUESTION PRESENTED

DOES THE SIXTH AMENDMENT REQUIRE THE EXCLUSION AT TRIAL OF AN UNCROSS-EXAMINED HEARSAY STATEMENT WITHOUT REGARD TO ITS INDICIA OF RELIABILITY?

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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF NEW MEXICO,

Petitioner,

v.

RALPH RODNEY EARNEST,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

TO THE HONORABLE UNITED STATES SUPREME COURT:

Respondent RALPH RODNEY EARNEST files this response to the petition for writ of certiorari filed by the Attorney General of New Mexico in the above styled cause. Respondent essentially accepts the facts set forth in the petition as true but provides additional facts where pertinent. Respondent contends that the writ should be denied based on the following argument. This response is timely if filed on or before July 19, 1985.

REASONS FOR DENYING THE WRIT

I.

PETITIONER FAILS TO DEMONSTRATE THAT SIGNIFICANT AND RECURRING PROBLEMS ARISE FROM THE RELATIONSHIP OF THE RULE AGAINST HEARSAY AND THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.

The Petitioner predicates its argument in support of the grant of the writ based on its perception of tension between Douglas v. Alabama, 380 U.S. 415 (1965) and Pointer v. Texas, 380 U.S. 400 (1965), and later decisions. The claimed tension does not exist, however, and the decisions discussed by Petitioner all reflect fidelity to the general principle that the Confrontation Clause requires that an accused be permitted to cross-examine a declarant whose confession to police officers is offered against him in a criminal trial.

The New Mexico Supreme Court found the facts in Douglas and the rule relied on by this Court there directly on point. In both cases accomplices refused to testify on Fifth Amendment grounds after giving confessions to police implicating the accused. In both cases, the State was allowed to read the accomplice's confession in the presence of the jury despite the fact that the accused was unable to confront the silent witness through meaningful cross-examination. Applying Douglas, the New Mexico court held that Respondent's conviction must be reversed because the statement disclosed to the jury was "highly prejudicial."

Petitioner contends that the Court has reached results seemingly inconsistent with Douglas in a series of subsequent decisions: California v. Green, 399 U.S. 149 (1970); Mancusi v. Stubbs, 408 U.S. 204 (1972); and Ohio v. Roberts, 448 U.S. 56 (1980). In each of these decisions, however, the accused had previously had an opportunity to meaningfully cross-examine an absent or recalcitrant witness prior to the introduction of

the inculpatory statement or testimony against him at trial. In California v. Green, the state was permitted to use the witness's prior statements which were inculpatory to the defendant which had been given to police officers and at his preliminary hearing, where trial counsel had vigorously cross-examined him concerning the inculpatory statements. Because of the opportunity for cross-examination, these statements were not only available as impeachment when the witness's story changed dramatically at trial, but could also serve as substantive evidence against the accused if believed by the jury. 399 U.S. at 151-152. An adequate opportunity for cross-examination at the accused's first trial was sufficient to permit later use of damaging testimony when a witness against the accused was unavailable in Mancusi v. Stubbs. The second trial was occasioned by the grant of federal habeas relief nine years after the initial conviction. 408 U.S. at 214-216. And in Ohio v. Roberts, the unavailable witness had previously testified under oath and been subjected to cross-examination. 448 U.S. at 70.

Respondent finds no tension between these decisions and the principles set forth in Douglas and Pointer v. Texas, 380 U.S. 400 (1965). Where a witness has testified under oath and has been meaningfully cross-examined, his subsequent unavailability does not preclude the prosecution from offering the prior testimony. This approach is consistent with the earlier decision in Mattox v. United States, 156 U.S. 237 (1895), in which this Court held that the death of a witness would serve to permit reliance on his sworn testimony from a prior trial in a subsequent proceeding.

Similarly, the decision in Douglas parallels the result in Bruton v. United States, 391 U.S. 123 (1968), in which the Court held that the right of confrontation is denied where the confession of a non-testifying co-defendant is offered against the accused in a joint trial. The Court noted that in such a circumstance

the accused is entitled to severance of trials precisely because his co-defendant "does not testify and cannot be tested by cross-examination." 391 U.S. at 136.

In California v. Green, Justice White observed:

> While it may be readily conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest that the overlap is complete and that the Confrontation Clause is nothing more of less than a codification of the rules of hearsay and their exceptions as they existed historically at common law. Our decisions have never established such a congruence; indeed, we have more than once found of a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

399 U.S. at 155-156. Rather than the seemingly inconsistent line of authority perceived by the Petitioner, the Douglas/Pointer rule is entirely consistent with California v. Green, Mancusi v. Stubbs and Ohio v. Roberts, with regard to the Court's concern that testimony prejudicial to the accused be subject to testing by cross-examination before it is deemed admissible during a criminal trial. Where the testimony of an unavailable witness has not been subject to cross-examination, and involves statements of an accomplice or co-defendant of an inculpatory nature as to the accused, the Court has not hesitated to hold that the state may not rely on this testimony sustantively as a basis for conviction.

II.

PETITIONER HAS NOT SHOWN THAT THE STATEMENT INVOLVED IN THIS CASE BEARS A SUFFICIENT INDICIA OF RELIABILITY TO JUSTIFY RELAXATION OF THE CONFRONTATION CLAUSE REQUIREMENT THAT THE ACCUSED BE AFFORDED AN OPPORTUNITY TO CROSS-EXAMINE THE DECLARANT.

Petitioner follows its argument that the decisions of this Court are inconsistent in reconciling demands of the constitutional confrontation clause with accepted rules of evidence by asserting that the reliability of a statement may justify its admission independent of any opportunity for cross-examination. In advancing this position, Petitioner relies on the formulation set forth in Ohio v. Roberts which appears to authorize admission of any statement which would traditionally be admissible as an exception to the hearsay rule or which should be admitted because it bears particularized guarantees of trustworthiness. 448 U.S. at 66.

The facts in Ohio v. Roberts support the conclusion that statements previously made under oath or during judicial proceedings in which the party/opponent has had an opportunity to meaningfully cross-examine the declarant is one such recognized exception. Even if the indicia of reliability can be inferred by categorizing the statement within a firmly rooted hearsay exception, the Court did not appear to hold that the facts surrounding a particular statement or its making would not so undermine the notion of reliability that it would effectively be rebutted or called seriously into question.

The cases cited by Petitioner demonstrate the lack of support given for its position by lower courts which have dealt with the subject. For instance, in United States v. Katsougrakis, 715 F.2d 769 (2nd Cir. 1983), the court looked to significant evidence of corroboration of the declarant's statement, made shortly before his death to a personal friend, rather than a governmental agent. Id. at 775. The court expressly noted that in its prior decision,

United States v. Oliver, 626 F.2d 254, 261 (2nd Cir. 1980), it had warned that a declarant may be motivated to inculpate a third party in an effort to gain immunity or a reduced sentence. Because Katsougrakis made the statement to a friend, rather than agent, and because the statement was against his penal interest, expressed his participation in the conspiracy and was factually corroborated, it was deemed properly admitted. 715 F.2d at 777-778. In contrast, in the instant case, the confession was given as a result of custodial interrogation and the declarant was placed in exactly those circumstances warned about in Oliver.

In United States v. Lisotto, 722 F.2d 85 (4th Cir. 1984), cert. denied, 104 S.Ct. 1682, also relied on by Petitioner, the statements were admitted as declarations against penal interest of the declarants precisely because they were co-conspirator fugitives at the time of trial. Arguably, all co-conspirator statements are also admissible under the exception of declarations against penal interest since they impliedly link the declarant to the conspiracy and its object. Here, in contrast, the statements of Boeglin were not admissible as co-conspirator statements since they were made after termination of the conspiracy and while he was in custody. Compare, Dutton v. Evans, 400 U.S. 74 (1970) (holding application of Georgia's co-conspirator declaration rule which is broader than federal rule did not violate confrontation right where statement was made by co-conspirator while in custody but statement was of minimal significance in light of overwhelming evidence in state's case). Petitioner notes that here the statement was "assuredly devastating to the defense and very important to the prosecution's case." (Pet. for writ of cert., at 8, n. 2).

Finally, Petitioner relies on the decision of the Washington Supreme Court in State v. Parris, 98 Wash.2d 140, 654 P.2d 77 (1982). The declarant was involved in drug transaction, asserted his Fifth Amendment privilege and was ruled "unavailable" to testify

at trial. Id. at 78. The Parris Court did not conclude that the statement alone fell within a "firmly rooted exception" to the hearsay rule, noting the problems posed by self-serving declarations against penal interest made by persons in custody. Instead, the court held that an inculpatory declaration had to accompanied by corroborating circumstances clearly indicating its trustworthiness. Id. at 81-82.

Moreover, the Parris Court looked to the Fifth Circuit opinion in United States v. Alvarez, 584 F.2d 694 (5th Cir. 1978) for discussion of factors to be considered when assessing the trustworthiness of a statement made by an unavailable declarant. These five factors are summarized: 1) motive of the witness to lie; 2) general character of the declarant; 3) whether more than one person heard the statement; 4) whether the statement was made spontaneously; and 5) the timing of the declaration and the relationship of the declarant and witness. Applying those factors to the Boeglin statement, it is clear that he had a reason to inculpate Respondent in an effort to curry favor with the police after admitting his own involvement in the murder and could well have done so falsely; he was by admission a person of low character, admitting to drug dealing and murder; the statement was not made spontaneously, but was made during custodial interrogation after two previous statements had been made; and finally, the witness who testified was the officer who took the statement.

Justice White, dissenting in Bruton, supra at 141-142, observed:

> Due to his strong motivation to implicate the defendant and to exonerate himself, a co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence. Whereas, the defendant's own confession possesses greater reliability and evidentiary value than ordinary hearsay, the co-defendant's confession implicating the defendant is intrinsically much less reliable.

The Eighth Circuit, in Olson v. Green, 668 F.2d 421 (8th Cir. 1982), cert. denied, 102 S.Ct. 421, applied similar reasoning in

declining to apply Ohio v. Roberts to custodial statements offered as substantive evidence when the declarant has refused to testify. Id. at 427-428. The fact that the statements might be admissible under the applicable state evidentiary rule would not supplant confrontation guarantees of the federal constitution because the circumstances surrounding the statements did not clearly indicate their trustworthiness. The court also reviewed current circuit decisions on point. Id. at n. 11.

As a general rule, Respondent contends that the confession to law enforcement offers made by a non-testifying co-defendant, co-conspirator or accomplice simply does not bear inherent guarantees of trustworthiness as to bring such a statement within the Ohio v. Roberts formulation. At the least, each statement offered in such fashion must be reviewed on an independent basis in order to assess trustworthiness since it cannot be inferred from the simple fact that the type of statement made might qualify under a general exception to the hearsay rule.

The decisions relied on by Petitioner fail to demonstrate that this Court's position in Douglas v. Alabama has effectively been, or should be, altered based on the facts presented in this case. Because of the inherently damaging nature of such a statement and the environmental factors likely in its making, cross-examination of the declarant remains a constitutionally mandated right to guarantee that an accused is not convicted solely on the story of another who seeks to minimize his participation in the offense or gain from inculpating the accused. The likelihood of falsification of testimony is simply too great to permit statements of a non-testifying co-defendant inculpating the accused to be used substantively at trial without any benefit of cross-examination by the accused.

III.

THE DECISION OF THE NEW MEXICO SUPREME COURT IN RELYING ON DOUGLAS v. ALABAMA IS CORRECT.

Petitioner argues that the New Mexico Supreme Court's decision would "reverse (a) trend" toward more flexibility in the admission of statements not subject to cross-examination. According to Petitioner, this approach elevates the rule against hearsay to constitutional status, with the only exception being admissibility of statements made at a prior judicial proceeding. The problem with the perceived trend is that it does not exist, or if it does, it does not exist in the decisions of this Court cited by Petitioner in support of its argument.

Elevation of the rule against hearsay to constitutional status is not the issue to be addressed; rather, Petitioner would subordinate the constitutional guarantee to confrontation to the operation of local rules of evidence and construction of exceptions to the hearsay rule. Rather than bestowing constitutional status on the hearsay rules, this Court has consistently sought to reconcile developments in the law of evidence and constitutional guarantees. In the cases relied upon by Petitioner, the "trend" can only be seen to involve the recognized use of statements made by unavailable declarants who have previously been cross-examined. To suggest that the trend in this Court has been broader is simply incorrect. With respect to confessions of non-testifying co-defendants or accomplices—as opposed to statements made by co-conspirators during the course of the conspiracy—this Court has required that an accused be permitted to confront the declarant and cross-examine him with regard to the statement given before that statement may be used substantively against him at trial.

This concept of "confrontation" as discussed California v. Green:

> (1) insures that the witness will give his statement under oath—thus, impressing him with the seriousness of the matter and guarding against the lie by the possibility of

> of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth," (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

399 U.S. at 158.

In the instant case, the declarant was not sworn prior to giving his confession, was not subjected to cross-examination, and did not expose himself to the judgment of the jury as to his credibility by giving testimony at trial. The goal of confrontation in Respondent's case was completely defeated by circumstances in which the statement was ultimately used due to his inability to confront the confessing co-defendant.

Moreover, the facts surrounding the statement suggest the inherent problems in relying on custodial statements generally without affording the accused the opportunity to cross-examine the declarant. The record at trial showed that the declarant, Boeglin, admitted to use of methamphetamine prior to being subjected to custodial interrogation; he was not tested for presence of the drug in his body at the time the statement was given even though the officer taking the statement testified that Boeglin was "hyper;" and he made the confession without having first been sworn in by a magistrate or having been advised by an attorney. (Tape 15/490; Tape 13/390-395, 408, 546; Tape 14/033, 060; Tape 13/370-380, 585; Tape 15/373).

Second, in his statement Boeglin minimized his participation in the offense and the statement itself suggests his attempt to use his statement to make a deal with police. He also gave other statements in which he denied his own participation in the offense. (Tape 15/97, 317-322).

Third, the statement given by co-defendant Boeglin identified the other participants in the offense, but did not link either person to the Respondent. At best, the statement refers to one of the other persons involved in the murder as "Rod or Rob," but generally refers to that individual as "Rob." He also admitted

that he was not "sure" what this individual's name was. (Tape 16/37, 88-166). Although the officer testified that he knew Respondent as "Rod" or "Rodney," there was no evidence that Boeglin ever independently identified Respondent as the person he was intending to refer to when he made the statement. (Tape 16/46).

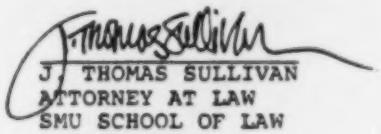
These factors demonstrate the reason why cross-examination was so critical to Respondent in this case. First, he needed to be able to establish through questioning Boeglin whether or not Boeglin even meant to refer to him when he gave the confession. If he did not, the confession clearly had no probative value in the case. Second, he needed to be accorded an opportunity to test the accuracy of the statement in light of Boeglin's mental condition and his apparent desire to gain some benefit from his confession. Third, he needed to be able to question the integrity of the statement in light of other, conflicting statements which Boeglin gave on the same day to police. In this case, Petitioner cannot rest his claim of the "indicia of reliability" of Boeglin's statement on any exception to the hearsay rule in light of the facts developed at trial which show the inherent lack of trustworthiness of Boeglin's confession. If Respondent was to be convicted on the state's substantive use of this statement, he was at least entitled to cross-examine Boeglin in order to defend himself against the accusations contained therein.

The New Mexico Supreme Court correctly applied Douglas v. Alabama in holding that Boeglin's statement was improperly admitted at Respondent's trial.

CONCLUSION

Based on the foregoing argument, Respondent submits that the writ should not issue to review the judgment of the New Mexico Supreme Court on the question advanced in the petition. The court below correctly applied this Court's prior decision in Douglas v. Alabama in reversing Respondent's conviction and remanding this cause for new trial. Respondent prays the Court deny the writ.

Respectfully submitted,



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JOINT

APPENDIX

Supreme Court, U.S.
F I L E D
DEC 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-162

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF NEW MEXICO,
Petitioner,

v.

RALPH RODNEY EARNEST,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 19, 1985
CERTIORARI GRANTED OCTOBER 21, 1985

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RELEVANT DOCKET ENTRIES

Date	Entry
3/23/82	Criminal Information Filed.
5/14 82	Amended Criminal Information Filed.
9/7/83	Motion by the State to Determine the Admissibility of Phillip Boeglin's Statement.
9/13/83	State's Motion to Grant Use Immunity to Phillip Boeglin.
9/13/83	District Court Order Granting Use Immunity to Phillip Boeglin.
9/13/83	State's Exhibit 39, Transcription of Phillip Boeglin's Statement.
9/15/83	Excerpts from the District Court's Instructions to the Jury.
9/19/83	Judgment, Sentence and Commitment in the District Court.
3/21/84	Point of Error 3, Respondent Earnest's Brief in Chief to the New Mexico Supreme Court.
6/22/84	Point III, Petitioner State of New Mexico's Answer Brief to the New Mexico Supreme Court.
3/4/85	Opinion of the New Mexico Supreme Court in *State vs. Earnest*, 703 P.2d 872 (1985).
3/14/85	Petitioner State of New Mexico's Motion for Rehearing in the New Mexico Supreme Court.
3/21/85	New Mexico Supreme Court's Order Denying Petitioner's Motion for Rehearing.

IN THE DISTRICT COURT OF EDDY COUNTY
STATE OF NEW MEXICO

STATE OF NEW MEXICO, Plaintiff,	)	
vs.	)	No. CR-82-54
RALPH R. EARNEST, Defendant.	)	

CRIMINAL INFORMATION
(Filed March 23, 1982)

COMES NOW Lesley S. Williams, Assistant District Attorney, and states that the above-defendant did commit the following crimes:

COUNT I: MURDER, contrary to Section 30-2-1, N.M.S.A. 1978, and alleges that said defendant did unlawfully murder David Eastman, and that this did happen on or about February 12, 1982 in Eddy County, New Mexico.

COUNT II: CONSPIRACY, contrary to Section 30-28-2, N.M.S.A. 1978, and alleges that said defendant did knowingly combine with Perry L. Conner and Philip C. Boeglin for the purpose of committing a felony, towit: Kidnapping, and that this did happen on or about February 12, 1982 in Eddy County, New Mexico;

COUNT III: KIDNAPPING, contrary to Section 30-4-1, N.M.S.A. 1978, and alleges that said defendant did unlawfully take, restrain or confine David Eastman by force or deception with intent that he be confined against his will, and that this did happen on or about February 12, 1982 in Eddy County, New Mexico;

COUNT IV: CONSPIRACY, contrary to Section 30-28-1, N.M.S.A. 1978, and alleges that said defedant did knowingly combine with Perry L. Conner and Philip C. Boeglin for the purpose of committing a felony, to-wit: Distribution of a

Controlled Substance (Methamphetamines) and that this did happen on or about February 12, 1982 in Eddy County, New Mexico;

COUNT V: POSSESSION OF A CONTROLLED SUBSTANCE, contrary to Section 30-31-22A, N.M.S.A. 1978, and alleges that said defendant did intentionally possess methamphetamines with intent to distribute the same, and that this did happen on or about February 12, 1982 in Eddy County, New Mexico.

/s/ Lesley S. Williams
LESLEY S. WILLIAMS
Assistant District Attorney

WITNESSES:

Eddie E. Carrasco	Gary McCandless
Tony Dominguez	J. R. Wilkinson
Joe Johnson	Ray Ramirez
Dana Boeglin	Kim Chester
Michael Blount	Marilyn Sullivan

PENALTY:
Ct I: Capital Felony; Count II & IV: 4th Degree Felony; Ct. III: 2nd Degree Felony; Ct. V: 3rd Degree Felony.

IN THE DISTRICT COURT OF EDDY COUNTY
STATE OF NEW MEXICO

STATE OF NEW MEXICO, Plaintiff,	)	
vs.	)	No. CR-82-54
RALPH R. EARNEST, Defendant.	)	

AMENDED
CRIMINAL INFORMATION
(Filed May 14, 1982)

COMES NOW Lesley S. Williams, Assistant District Attorney, and states that the above-defendant did commit the following crimes:

COUNT I: MURDER, contrary to Section 30-2-1, N.M.S.A. 1978, and alleges that said defendant did unlawfully murder David Eastman, and that this did happen on or about February 12, 1982 in Eddy County, New Mexico.

COUNT II: CONSPIRACY, contrary to Section 30-28-2, N.M.S.A. 1978, and alleges that said defendant did knowingly combine with Perry L. Conner and Philip C. Boeglin for the purpose of committing a felony, towit: Murder, and that this did happen on or about February 12, 1982 in Eddy County, New Mexico;

COUNT III: KIDNAPPING, contrary to Section 30-4-1, N.M.S.A. 1978, and alleges that said defendant did unlawfully take, restrain or confine David Eastman by force or deception with intent that he be confined against his will, and that this did happen on or about February 12, 1982 in Eddy County, New Mexico;

COUNT IV: CONSPIRACY, contrary to Section 30-28-1, N.M.S.A. 1978, and alleges that said defedant did knowingly combine with Perry L. Conner and Philip C. Boeglin for the purpose of committing a felony, to-wit: Distribution of a

Controlled Substance (Methamphetamines) and that this did happen on or about February 12, 1982 in Eddy County, New Mexico;

COUNT V: POSSESSION OF A CONTROLLED SUBSTANCE, contrary to Section 30-31-22A, N.M.S.A. 1978, and alleges that said defendant did intentionally possess methamphetamines with intent to distribute the same, and that this did happen on or about February 12, 1982 in Eddy County, New Mexico.

/s/ Lesley S. Williams
LESLEY S. WILLIAMS
Assistant District Attorney

WITNESSES:

Eddie E. Carrasco	Gary McCandless
Tony Dominguez	J. R. Wilkinson
Joe Johnson	Ray Ramirez
Dana Boeglin	Kim Chester
Michael Blount	Marilyn Sullivan

PENALTY:
Ct I: Capital Felony; Count II & IV: 4th Degree Felony; Ct. III: 2nd Degree Felony; Ct. V: 3rd Degree Felony.

MOTION BY THE STATE TO DETERMINE THE ADMISSIBILITY OF PHILLIP BOEGLIN'S STATEMENT

IN THE DISTRICT COURT OF EDDY COUNTY
STATE OF NEW MEXICO

STATE OF NEW MEXICO, Plaintiff,	)	
vs.	)	No. CR-82-54
RALPH R. EARNEST, Defendant.	)	

MOTION
(Filed September 7, 1983)

COMES NOW the State of New Mexico by and through the Office of the District Attorney and respectfully moves the Court to set a hearing to determine whether the statement of Phillip C. Boeglin given to the Eddy County Sheriff's Department may be utilized pursuant to Rule 804 (a) (2) and (b) (4), New Mexico Rules of Evidence. As grounds therefor, movant would state to the Court as follows:

1. That at the previous trial of this matter the State called Phillip C. Boeglin as a witness.

2. That after being granted use immunity and being ordered by the Court to testify, Phillip C. Boeglin refused to testify.

3. There exists a possibility that Phillip C. Boeglin will once again refuse to testify after being granted use of immunity.

4. That the testimony of Phillip C. Boeglin is essential to the State's case.

5. That if the decision by the Court is not made prior to trial jeopardy will attach and may preclude retrial of this matter at some future date.

6. The Court's decision on this matter may necessitate an appeal by one party or the other as to the question of law.

WHEREFORE, movant prays the Court for an Order setting a hearing on this Motion.

/s/ Thomas A. Rutledge
THOMAS A. RUTLEDGE
Deputy District Attorney

I hereby certify that a copy of the foregoing pleading was mailed to opposing counsel this 7th day of September, 1983.
/s/ Thomas A. Rutledge

STATE'S MOTION TO GRANT USE IMMUNITY TO PHILLIP BOEGLIN

IN THE DISTRICT COURT OF EDDY COUNTY
STATE OF NEW MEXICO

STATE OF NEW MEXICO Plaintiff, vs. RALPH R. EARNEST, Defendant.	)))))	No. CR-82-54

MOTION
(Filed September 13, 1983)

COMES NOW the State of New Mexico by and through Thomas A. Rutledge, Deputy District Attorney, Fifth Judicial District, and pursuant to Rule 58 of the New Mexico Rules of Criminal Procedure and Section 31-6-15, NMSA 1978 Comp., moves the Court for an Order granting PHILLIP C. BOEGLIN use immunity as to his testimony in the above-captioned and numbered cause.

In the judgment of movant the testimony of PHILLIP C. BOEGLIN is necessary to the public interests and in the prosecution of the crimes of Murder and Kidnapping, felonies, said charges currently pending against Ralph R. Earnest. PHILLIP C. BOEGLIN refuses to testify on the basis of exercising the privilege against self-incrimination.

The State agrees to comply with Section 31-6-15, NMSA 1978, as to statements made by PHILLIP C. BOEGLIN while testifying in the trial of Ralph R. Earnest in any future proceedings involving PHILLIP C. BOEGLIN as a defendant should such charges be filed.

/s/ Thomas A. Rutledge
THOMAS A. RUTLEDGE
Deputy District Attorney

DISTRICT COURT ORDER GRANTING USE IMMUNITY TO PHILLIP BOEGLIN

IN THE DISTRICT COURT OF EDDY COUNTY
STATE OF NEW MEXICO

STATE OF NEW MEXICO Plaintiff, vs. RALPH R. EARNEST, Defendant.	)))))	No. CR-82-54

ORDER
(Filed September 13, 1983)

THIS MATTER having come before the Court on Motion of the State of New Mexico to grant use immunity to PHILLIP C. BOEGLIN, and the Court having been advised in the premises,

ORDERS: That any statements made by PHILLIP C. BOEGLIN in the District Court trial of the State of New Mexico vs. Ralph R. Earnest, District Court No. CR-82-54, may not be used in any criminal proceeding stemming from the incident which is the subject of the aforementioned case against Ralph R. Earnest, except as provided by Section 31-6-15, NMSA 1978 Comp.

IT IS FURTHER ORDERED that PHILLIP C. BOEGLIN appear and testify in said criminal proceedings against Ralph R. Earnest.

/s/ Harvey W. Fort
DISTRICT JUDGE

STATE'S EXHIBIT 39, TRANSCRIPTION OF PHILLIP BOEGLIN'S STATEMENT

IN THE DISTRICT COURT OF EDDY COUNTY
STATE OF NEW MEXICO

STATE OF NEW MEXICO,)
Plaintiff,)
vs.) No. CR-82-54
RALPH R. EARNEST,)
Defendant.)

(Filed September 13, 1983)

VOLUNTARY STATEMENT PLACE
PRESENT TIME 3:13
DATE

My name is Phillip Boeglin; I am _____years of age; and I have finished _____ years of school.

This is Dennis DeLuche, Chief Investigator for the District Attorney's Office, Fifth Judicial District, State of New Mexico. The time is– what, Eddy? Deputy Eddie Carrasco: The time is 3:13. Mr. DeLuche: Present in the room is Detective Eddie Carrasco of the Eddy County Sheriff's Office.

Q. Would you state your name for the tape?

A. Phillip Boeglin.

Q. Okay. Phillip, I had a conversation with you previous– ~~to~~ today, didn't I? And– at that time you were– you were given your Rights, and you did make a statement to us. Is that correct?

A. Yeah.

Q. Now– did you uh– have an attorney from that time til now?

A. Huh-uh.

Q. Okay. Do you still recall your rights Yes Uh– do you want to talk to us again?

A. Yeah.

Q. At uh– at this time period?

A. Pardon?

Q. Do you want to talk to us again now at this time period?

A. Yeah.

Q. Okay. Do you recall your rights? Your right to remain silent?

A. Yeah.

Q. That anything you say could and would be used against you in a court of law?

A. Uh–huh.

Q. That you have the right to have an attorney?

A. Yeah.

Q. With you while you're being questioned? If you cannot afford an attorney, one will be appointed, free of charge– doesn't cost you anything.

A. Okay. ~~Two thousand dollars~~ Ten Thousand Dollars Up Front

Q. Well– you can exercise these rights at any time. Not answer any questions, or make any statement. . .

A. Yeah.

Q. You understand that. Now, are you specifically waiving your right to an attorney to talk to us this second time?

A. Well, I was hoping I could make some kind of deal.

Q. Well, let me tell you this much about deals at this time–

A. 'Cause uh– you're asking me to– I've never snitched before, and if I do–

Q. I'm not asking you to snitch, or anything. You're using the wrong term, Mr. Boeglin.

A. Yeah, but if you go back inside–

Q. Okay.

A. –you're a dead man.

Q. First of all, I'm not offering you any deals. What I offered you this morning was, you tell the truth.

A. And what do I get– six months in the County Jail, then?

Q. Uh– I'm not offering you any deals. All I ~~can~~ will say to you, is– is– you give us the truth, and– and we verify it to be the truth– first of all, you've already told me one story, but if we verify it to be the truth, Mr. Boeglin, then I will go to the prosecutor who's prosecuting the case, and I'll– I'll talk to him. And I'll tell him what information you've given, and– and then that is completely up to the prosecutor. Do you understand?

A. Yeah.

Q. I'm not trying to play hard ball with you. All I'm telling you is– is–

A. I'm just trying to live. That's all I'm getting down to, all right? They got me doing– I mean us– I didn't tell on nobody or nothing this morning. I didn't tell nothing, and now, all through the County Jail– I was the one that did every damn thing and all this– I already got me a marked man, and I don't know what the hell's going on here–

Q. Are you saying you've already got a jacket?

A. Yeah.

Q. Who put the jacket on you?

A. Hell, I don't know.

Q. Are you concerned for your– your safety?

A. Yeah Real concerned

Q. Well– I– I told you, I can't make you a deal. You can tell me the truth, and if we find it to be the truth, that's– that's– that's fine. You can't give me half the truth.

A. Oh– I ain't planning to, but I expect something in return, too, like my freedom.

Q. Well, I am not going to offer you your freedom. I can't offer you your freedom. What I– I can do, is just what I told you I would do. If you give me uh– the information, and the truth, depending upon what you're involvement is– I don't know what your involvement is at this point. You haven't told me. Now, for example, you– you say, Okay, I'm going to tell you the truth if you'll let me go, and I say, Fine, Mr. Boeglin, we've got a deal, and you tell me, Okay, I was the one that cut his throat. Now, what kind of deal is that, That's stupid, isn't it? I don't have any idea what you're going to say to me, sir.

A. Yeah.

Q. And, until we know what the truth is–

A. Can you get a lie detector test, and ~~put it in your~~ put it in here on me

Q. Well, but I'm telling you until we know what the truth is–

A. Yeah, but how long is that going to take?

Q. Well uh– what do you mean, how long is it going to take?

A. Find the truth– you know what it's like sitting in a six-by-nine cell with no light?

Q. Well– I– I don't know uh– where you're at. If you're concerned about your physical safety in the County Jail, maybe we can arrange– make arrangements to put you somewhere else.

A. Huh– it's all jail, it's all the same. Get the jacket everywhere you go.

Q. If you– if you have information uh– that you're not involved in a homicide, but you're present during a homicide, or something like that, how does this endanger you?

A. ~~I was~~ endanger– does it me?

Q. Are you– you saying that you'll be treated as an informant?

A. Yeah.

Detective Carrasco: What are you being treated as, right now?

A. Well, they got me locked down– blue room– hear people talking from out of their cells, you know– word gets around–

Mr. DeLuche:

Q. Well– Phillip, I understand your position– I really do. I'm not– I'm not– saying that uh– you're a good man, bad man, or indifferent man. I'm saying, you're the one with the problem. Let me– let me tell you this much– I don't know the information you have, and I'm not buying ~~it~~ A Pig in a Poke Okay?

A. Yeah.

Q. You've already– you've already told us one story. If you shot straight first crack out of the bag, it might have been different– but, that's not what happened, is it? You're the one that's going to have to make some decisions, and I'll tell you this much, there is no District Attorney in the world who's going to sit down and make a deal with you when he has no idea what you're going to say.

A. I just don't want to get burned, okay?

Q. Well–

A. I was there– I knew what happened. I can tell you everything. Now, if you don't consider that worth a lot, that's fine, we can go to court, 'cause hell, I'll probably could save my damn time any fuckin' way– don't make a shit to me.

Q. I'm telling you– you tell us the truth, we verify it, you're talking about polygraph, then that's up to the District Attorney, that's not up to me.

Detective Carrasco: The truth though.

Mr. DeLuche: Not eighty percent– not eighty percent.

Detective Carrasco: One hundred percent.

Mr. DeLuche: If you're worried about being protected, while– while you're in custody, while this is being checked out, you'll be protected, there's no problem with that.

A. Oh yeah, speaking– goddam blue room– and still got a goddam snitch ~~there~~ Jacket on I don't know–

Q. You're the one with the weight on you. You're the one who's going to have to make some decisions.

Detective Carrasco: Do you understand that's a homicide, it's not just a petty thing, man?

A. Yeah, I know it. All right uh– the uh– start off, morning of the uh– whenever the hell it was– yesterday– I went out to Red's house– we got off on some crystal, then uh– went out to– uh– David Easton's house and talked to him for awhile and uh– Red fronted him eleven grams and uh– when his buddy got off from work, Mike– Mike was supposed to give uh– Red his bike for collateral, and uh– and uh– Mike got home and I don't know what happened, they just went in the back room, but anyway, it didn't work out, Mike didn't want to come off his bike for collateral, so uh– Easton ended up coming off his car for collateral. Okay, uh– Damn, uh– anyway, uh– he ended up with this El Camino for collateral and we went back out there a couple of hours later, and uh– got to thinking Easton was a– Narc– informant? And uh– so uh– went over to the house and talked to him for awhile and uh– over at his house– he was over at Wesley Davis', and we– uh– me and Rod– or Rob, whatever his name is– Red went over to– uh– Eastman's house and uh– we left. And uh– uh– well, me and uh– Rob went out there and went out there to Red's house and uh– after about an hour, Eastman and uh– Rick pulled up in the El Camino– well, when he first come in uh– I can't remember the exact words that uh– anyway, it got around to asking if he was an informant and they called certain

people from out of town that are uh– had been in prison with him at this time, and they said he was no good– waste him. That was all they said. Well– they had him tied up then, and uh– had him out in back shed, and uh– talked to him for awhile out there, then we took him in the house– and uh– we more or less took a vote, you know, what we was going to do with him to get rid of him– then we changed our minds and uh– decided, you know, to let him go, and this uh– other guy called up that uh– was supposed to have been good friends– now, I don't know these people's name, 'cause I wasn't associated with them, and uh– confirmed that– told us that, you know, he had informed on a bunch of people, and that uh– to waste him– well– things just kept on– getting worse, you know, at uh– Red's house– started to– slap him around, you know, and kick him, and shit– I never did hit him, I kicked him–

Q. Kicked?

A. Right– and uh– they finally decided they was going to– tie him up and take him out and– O.D. him, and uh– Push him over a cliff he's a hype, and uh– but Eastman had this problem– he wanted to die anyway, you know– just like– doing him a favor, taking him out– so I stayed up at the house when they left the first time– they was gone about a half hour, and then they came back and they had Eastman still with them, and so we went into the house again, and uh– two more people came over there– I think one was his next-door neighbor– and uh– one was uh– I don't even know who he was, tell you the truth, but, I described him to you earlier– uh– I don't know, the ~~temperature~~ Tension just kept on building, you know– those kind of ~~talks~~ thoughts that nobody really wanted to– you know, do nothing– to me– said, the hell with it, you know– go ahead and, you know– get him, you know, so uh– I don't know, something must have come out about– maybe it's

the impression I got, I don't know– but uh– they mixed a– no– well, first they gave him four grams, 'cause he was going to O.D. him ~~still~~ his self and he fired up a Didn't four grams of crystal, you know, then he ~~began to~~ O.D. and uh– yeah– got real sick– we took him out to the– well– those two other guys left then– those two guys that was there, and left me– Rob and Red and me was there– and we took him out to the country on Loving Highway and uh– well, first the train was crossing and we stopped, and– Red, you know, pulled him– took him out there and kicked his ass a little bit more, you know, and uh– went on down the road and uh– Red starts to slow down, you know, and said, well, we might as well do it now, and I was– we was all four in the front of that El Camino– I was setting here, Eastman was here, Rob was here, and I was there, and uh– I opened up my door and the car slid around like that, and I fell out my fuckin' door, and uh– Eastman jumped out his, and– soon as he turned, he caught it by– right between the eyes and uh– he went down on the ground– was still alive, and I had the knife with me– I went to cut his throat, but it didn't cut– and I was– cut it again and it just barely cut it, and– I just dropped the knife after that– and– I don't know who else– could it be, but uh– the gun started jamming up, and uh– I don't know how many shots he jammed on– they re-loaded it, and– fired two more shots into him– uh I guess into his head, I don't know– then we jumped into the car– went out and stashed everything and– come back to Red's house and cleaned up everything and went and threw it all at the dump, and– went to my house– and– when we was coming down the road is when we got arrested.

Mr. DeLuche: Who– who had the pistol?

A. Uh well, Rob shot him first.

Detective Carrasco: With what kind of pistol?

A. Uh–handgun.

Q. What did he do with that pistol?

A. Threw it out in the country.

Q. Do you know where?

A. Yeah, I know, if I could find it, I probably could.

Q. Where-abouts in the country?

A. Oh– way out by Black River–it's on– it was dark hauling ass on them dark roads.

Mr. DeLuche: Let's, let me back up just a little bit, now. Rob shot him first, and then– who shot him after that?

A. I don't know. I didn't look.

Q. Where– where did you take this stuff and stash it?

A. Uh– an old– up uh– you go out the Old Cavern Highway– you come to an intersection– dirt road on one side going to Black River, and all I know is way back up on that road under a big rock.

Q. Okay, and what all was stashed up there?

A. Everything..

Q. Well, and ~~your~~ Their dope– is it stashed up there?

A. Not the dope– I don't know– what happened to it, because, when he come to the house, he had– thirteen or fourteen grams on him, and uh– it come up missing and then it got back in, you know, and they were wanting dope– it was uh, you know, I don't know what the hell it was– speed So, I don't know what happened–

Q. Uh– everything's stashed up there– did you mean the knives?

A. Yeah.

Q. Uh– his jacket?

A. I don't know about that.

Q. Okay. What– what else can you think of?

A. I don't know– I stayed in the El Camino with uh–

Detective Carrasco: What about the gun? Is it stashed out there?

A. As far as I know.

Mr. DeLuche: Now the– other two guys that were there while he was tied up, and that were, waiting and what-not, can you–

A. They went in there

Q. Okay, were they aware that he was there?

A. Yeah, but I don't know if they was aware of what was going on. I don't know– he wasn't tied up then and was the house– I don't know– some of it's kinda blank, maybe I– I ain't never killed nobody or ever seen anybody get killed– I don't know– being a snitch uh– if I did.

Q. The– about what time was it then, when you actually entered out on the highway? Was it– before dawn– it was still dark outside?

A. Yeah.

Q. When you were out on the Loving Highway?

A. I don't know really what time it was.

Detective Carrasco: The storage shed that's– behind Red's house– there's a carton of chocolate milk– who left that there?

A. Uh– there ain't no telling– I couldn't tell you that.

Mr. DeLuche: When uh– when he was tied up, what was he tied up with?

A. A rope. But I don't know what happened to it, 'cause when we untied him, we weren't looking for to find

Detective Carrasco: Do you think the ropes were left in storage?

A. Buddy, I don't know.

Q. Well– try to think back– when you-all brought him out of the storage room. Was he untied then? Or did you take him in the house tied up?

A. I think he was still tied up.

Mr. DeLuche: What– what was he in– informing on– I'm kinda confused, now–

A. I don't know.

Q. But that was while he was at the State Penitentiary?

A. I don't know.

Detective Carrasco: Okay. Who did uh– Red talk to over the phone?

A. I don't know that either. I know it was somebody that had done time with him.

Q. Who were the two individuals that were there at the house when you-all had him tied up?

A. Well, I don't think he was tied up when they were there.

Q. Did they know what was going on?

A. I don't know that either, buddy.

Q. Well, who were those individuals?

Mr. DeLuche: A next door neighbor?

A. Yeah. Other than that, I don't know.

Q. What uh– can you describe them?

A. Yeah– I did earlier I– really don't remember that much, you know–

Q. Well– this uh– this started out by fronting him eleven grams, now you said when he came back, you had fourteen–

A. He fronted him three the night before.

Q. Oh, he fronted him three the night before? Okay.

Detective Carrasco: Phillip, in order to corroborate much of

this information, can you remember who those people were, so we can– be able to talk to them?

A. I know one was his neighbor, you know– I– you know, I'm going to have to probably fuckin' move out of town anyway after this, you know– people carry a lot of fuckin' weight– and I know if I go behind the fuckin' walls, I know they'll kill me right off the fuckin' Get But in County Jail– I don't know– if I can– survive in that son-of-a-bitch, man, the– way it is already– they got me– I don't know– fuckin'– like I was one of- had done it all was all mutilated, and they was all wantin' to put the finger at me on uh–

Mr. DeLuche: What– what knife did you have?

A. It was a pocketknife– well, it was his knife.

Q. It was uh– whose knife?

A. Uh– uh– Eastman's.

Q. Oh, it was Eastman's.

Detective Carrasco: And that's out stashed? Okay. When you had him– at the house– did he leave anything that belonged to him there in the house? Wallet or anything?

A. No– he didn't have a wallet.

Q. Okay. When you-all dumped him, you said you came back– where did you go to?

A. We went and washed everything up or cleaned everything up.

Q. Where at?

A. Oh– we didn't wash it, we just wiped it off.

Q. Where?

A. Down that road. Out there to the–

Q. Did you go back to Red's house, though, to change clothes or–

A. Huh-uh.

Q. Uh– the clothing you were wearing this morning, and the clothing that Red and Rob were wearing this morning, is that the same clothing they had on?

A. I don't know if uh– they changed clothes or not, you know– when we went back to Red's house they went back in the bedroom and stashed some stuff–

Q. What did they stash?

A. Drugs.

Q. Where would they have stashed it?

A. I don't know, they just about got them all with it.

Mr. DeLuche: Uh– when you went to your house, what were you doing at your place?

A. I went over there to– I was going to change, and I never got around to it.

Q. Okay. Did you have to kick the backdoor in?

A. Yeah.

Q. Okay, that was you that did that?

A. Yeah.

Q. Uh– did you stash anything at your place?

A. Uh– one little back of weed. You know, I took it up there and I think I had another bag there.

Q. Uh– I'm going to end this interview. What time have you got?

Detective Carrasco: Three Fifty-four.

Mr. DeLuche: Three Fifty-four Hours.

EXCERPTS FROM THE DISTRICT COURT'S INSTRUCTIONS TO THE JURY

IN THE DISTRICT COURT OF EDDY COUNTY
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff

vs. NO. CR-82-54

RALPH R. EARNEST,
Defendant

(Filed September 15, 1983)

JURY INSTRUCTION NO. 12

12 You are the sole judges of the facts in this case. It is your duty to determine the facts from the evidence produced here in Court. Your verdict should not be based on speculation, guess or conjecture. Neither sympathy nor prejudice should influence your verdict. You are to apply the law as stated in these instructions to the facts as you find them, and in this way decide the case.

JURY INSTRUCTION NO. 13

13 You alone are the judges of the credibility of the witnesses and the weight to be given to the testimony of each of them. In determining the credit to be given any witness, you should take into account his truthfulness or untruthfulness, his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have and the reasonableness of his testimony considered in the light of all the evidence in the case.

IN THE DISTRICT COURT OF EDDY COUNTY
STATE OF NEW MEXICO

STATE OF NEW MEXICO,)
Plaintiff)
vs.) NO. CR-82-54
RALPH R. EARNEST,)
Defendant)

JUDGMENT, SENTENCE AND COMMITMENT
(Filed September 19, 1983)

THIS MATTER coming on for hearing on September 19, 1983, before THE HONORABLE HARVEY W. FORT, District Judge, Plaintiff appearing by THOMAS A. RUTLEDGE, Assistant District Attorney, and Defendant appearing personally and by his attorney, GARY MITCHELL, the Defendant having been convicted on September 16, 1983, by a jury of twelve people of the following crimes: Count I – FELONY MURDER; Count II – CONSPIRACY TO COMMIT MURDER; Count III – KIDNAPPING; Count IV – CONSPIRACY TO COMMIT DISTRIBUTION OF A CONTROLLED SUBSTANCE, to-wit: METHAMPHETAMINES; Count V – POSSESSION OF A CONTROLLED SUBSTANCE, to-wit: METHAMPHETAMINES.

Defendant is hereby found and adjudged guilty and convicted of said crimes, and is sentenced to be imprisoned in the Corrections Division of the Criminal Justice Department of the State of New Mexico for the following term: Count I – LIFE; Count II – EIGHTEEN (18) YEARS with all of said EIGHTEEN (18) YEARS suspended except for NINE (9) YEARS; Count III – NINE (9) YEARS; Count IV – EIGHTEEN (18) MONTHS and Count V – THREE (3) YEARS followed by FIVE (5) YEARS of statutory parole. Said sentences are to run consecutive to each other and consecutive to the LIFE sentence.

Defendant is to receive credit for pre-sentence confinement from February 12, 1982 to January 6, 1983 and post-confinement from September 16, 1983.

Therefore, You the Sheriff of Eddy County, New Mexico, are hereby ordered to take the above named Defendant in custody and deliver him together with this Commitment to the Corrections Division of the Criminal Justice Department of the State of New Mexico which is hereby ordered to receive him and confine him for the above term.

/s/ Harvey W. Fort
HARVEY W. FORT, District Judge

cc: ADA

Gary C. Mitchell
P. O. Box 2460
Ruidoso, NM 88345

Adult Probation Office

Eddy County S.O.

Dept. of Corrections

POINT OF ERROR 3, RESPONDENT EARNEST'S BRIEF IN CHIEF TO THE NEW MEXICO SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
vs. No. 15-162
RALPH R. EARNEST,
Defendant-Appellant.

(Filed March 21, 1984)

POINT OF ERROR 3

THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED CONSTITUTIONAL ERROR IN ADMITTING THE CONFESSION OF WITNESS BOEGLIN AFTER THE WITNESS REFUSED TO TESTIFY EVEN UNDER AN ORDER GRANTING HIM USE IMMUNITY FOR HIS TESTIMONY.

Summary of Material Facts

The State called Phillip Boeglin to testify against Defendant. (Tape 11/470). Boeglin refused to testify concerning the incident in which Easton was killed and the trial court entered an order granting him use immunity for his testimony. (Tape 11/495-510). The motion and order relating to use immunity appear in the record proper. (RP, 401-402). Following the grant of immunity, however, Boeglin persisted in his refusal to answer substantive questions concerning the murder, being found in direct criminal contempt by the trial court. At this point, the State moved to have Boeglin declared unavailable as a witness, which the trial court did over defense objections. (Tape 12/550–Tape 13/215).

Thereafter, the State called Dennis DeLuche to testify. His testimony focused on his efforts in questioning Boeglin about

the offenses subsequent to the arrest of the three co-defendants. He identified State's Exhibit 39 as a transcription of the tape recording introduced as State's Exhibit 39a, which contained Phillip Boeglin's third statement regarding the circumstances of the murder of David Easton. (Tape 13/285-340). After voir dire by defense counsel, the trial court overruled counsel's objection to the use of the statement before the jury on the grounds that its use would violate Defendant's right to confront the witness and engage in meaningful cross-examination. (Tape 13/660-680). The court then allowed the jury to use individual transcripts to follow the tape of the statement as it was played to the jury. (Tape 14/290-330; 358-500). Defendant also objected to the jury's use of the transcripts. (Tape 14/261).

Argument and Authorities

Prior to trial, the court advised counsel that it would admit Boeglin's statement in the event he refused to testify in the face of citation for contempt, based on its reading of the opinion in *State v. Martinez*, 99 N.M. 353, 658 P.2d 428 (1983). There, this Court had ruled that no reversible error occurred where the statement of an unavailable witness was read to the jury after the witness refused to testify and was cited for contempt. This Court held that the witness was unavailable and, pursuant to Rule 804(a) (2), N.M.R. Evid. (1978), his unavailability rendered the statement admissible. On appeal, however, Martinez had apparently claimed that her right to engage in meaningful cross-examination after introduction of the statement had been denied and that the trial court committed fundamental error in permitting the witness to later come in and offer testimony in person. Because the witness was subject to full cross-examination after giving the live testimony, the Court held that there was lack of opportunity to cross-examine the witness concerning his statement to the police.

Defendant submits that the *Martinez* decision must be limited to the factual context present in that case and

distinguished accordingly. The opinion does not make clear whether witness Torres was charged as a co-defendant, was a co-conspirator or the extent to which the statement was inculpatory as to the accused. What is clear is that there was an opportunity to cross-examine the witness and that no Confrontation Clause interest was jeopardized by the procedure, in light of the witness's eventual decision to testify in person.

In Defendant's case, in contrast, the statement of witness Boeglin was that made by a co-defendant also charged with conspiracy to commit the murder and the statement was inculpatory as to Boeglin and presumably, as to Defendant. The statement was improperly admitted for three reasons: 1) admission of the statement deprived Defendant of his right to confront and cross-examine the witnesses against him, protected by the Sixth Amendment to the United States Constitution and Article II, section 14 of the New Mexico Constitution; 2) the statement could not properly have been admitted as that made by a co-conspirator in furtherance of the conspiracy, since the conspiracy had terminated before the statement was given; and 3) the statement lacks the indicia of reliability and trustworthiness required for admission of statements under exceptions to the hearsay rule.

Confrontation Clause violations

Admission of the Boeglin statement violated Defendant's right of confrontation in two important respects. First, it violated his right to cross-examine the witness on the issue of whether or not he actually gave the statement and whether or not the statement, as played and transcribed for the jury's use, was a correct recitation of the statement he made. In *Douglas v. Alabama*, 380 U.S. 420 (1965), the Supreme Court held that the Confrontation Clause was applicable to state prosecutions. There, the Court considered a situation factually similar to that posed by Defendant's case: during a severed trial the prosecutor asked the accused's co-defendant a series of

questions, reading from the co-defendant's confession. The witness refused to testify, invoking his privilege not to testify in spite of the trial judge's conclusion that his prior conviction on the same charges barred reliance on his Fifth Amendment privilege of silence and over his order to the witness to answer the prosecutor's questions. *Id,* at 416. Through this procedure, the prosecutor read the entire document purporting to be the witness's confession before the jury, intermitently inquiring of the witness whether he had made the statement. The prosecutor then called law enforcement officers to testify that the document embodied the witness's confession.

The Supreme Court held that this procedure denied the accused the right to confrontation because it deprived him of any opportunity to cross-examine the witness concerning whether or not the document either embodied his confession or whether he had made any statement. *Id,* at 419-420. In this case, Defendant was unable to inquire of Boeglin as to the authenticity of the purported statement, or even as to whether Boeglin had, in fact, given any statement at all.

More critically, counsel was unable to cross-examine the witness concerning whether the references in the statement could correctly be taken to refer to Defendant. As counsel developed in the cross-examination of witness DeLuche, who testified that he took the statement from Boeglin, the statement never named the third individual who Boeglin claimed was involved as "Ralph Earnest." (Tape 16/37). The transcript, State's Exhibit 39, reflects that Boeglin referred to the other person as "Rob or Rod" and stated that he was not sure what his name was. All other references in the statement were to "Rob." (Tape 16/88-166). There was testimony in the record, including that from DeLuche that Defendant is known as "Rod." (Tape 16/66). However, as counsel developed, DeLuche never conducted a live or photo lineup to ascertain whether Boeglin meant Defendant when he referred to "Rod or Rob" in his statement. (Tape 16/46).

Thus, Defendant was initially deprived of any opportunity to question the witness regarding whether he had made a statement, whether the statement admitted was an accurate rendition of the statement or whether he intended any part of the statement to refer to Defendant.

Second, and more significantly, Defendant was deprived of any opportunity to cross-examine Boeglin regarding the substance of his alleged statement. The primary purpose of the Confrontation Clause was expressed by the Supreme Court in *Mattox v. United States*, 156 U.S. 237 (1895):

> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . .being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Id. at 242-243. The *Douglas* Court amplified these earlier concerns:

> "This case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse. The alleged statements clearly bore on a fundamental part of the State's case against petitioner. The circumstances are therefore such that 'inferences from a witness' refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant.'"

In the instant case, Boeglin's refusal to testify in spite of the trial court's order could have contributed to the jury's perception that the statement was accurate, depriving Defendant of a chance to rebut that impermissible inference because of his inability to cross-examine Boeglin before the jury.

The inability of the accused to cross-examine the confession given by a co-defendant who refuses to testify personally renders the confession inadmissible because of the infringement on the accused's right to confront the witness against him and test the accuracy of the statement. *Bruton v. United States*, 392 U.S. 123 (1968). *Bruton* involved a joint trial; in the instant case the trials were severed. Nevertheless, the fact that the trials have been severed does not restore the right of confrontation to an accused whose co-defendant admantly refuses to testify and subject himself to cross-examination. Because Boeglin's testimony was critical to the State's case, moreover, supplying the only direct evidence of Defendant's participation in the offenses, the error in admitting Boeglin's statement could not be deemed harmless. In *United States v. Key*, __F.2d__ (No. 82-2955, 10th Cir. 1984), the Court applied the *Bruton* rule in reversing the conviction of an accused charged with mail fraud, where the prosecution introduced his co-defendant's statement, inculpatory as to the accused, and essential to the government's case. While the government might have properly done so in certain limited instances, such as by excluding all references to the accused from the evidence, its failure to do so violated the accused's right of confrontation and deprived him of the opportunity to test the accuracy of the evidence. The Court reversed, noting that the error was cognizable under the "plain error" rule applicable in federal prosecutions.

The fact that Defendant's trial was severed from that of co-defendant Boeglin does not remove the constitutional taint from the proceedings, since the issue of severance is not dispositive of the Confrontation Clause claim. *See Douglas v. Alabama, supra.* (severed trials of co-defendants did not remove taint from inability to cross-examine). The "unavailability" of witness Boeglin did not justify admission of his statement against Defendant, who was denied any opportunity to cross-examine the witness regarding whether he had made the statement, whether it was accurate, or even whether the statement

referred to Defendant. Defendant's right to confront and cross-examine Boeglin was constitutionally rooted in the guarantee of the Sixth Amendment and in the New Mexico Constitution; the procedure engaged in by the trial court violated that right and requires reversal as constitutional error. *Pointer v. Texas*, 380 U.S. 400 (1965).

Co-conspirator exceptions

Certain statements made by non-testifying co-conspirators have been deemed admissible against an accused in a criminal prosecution. While the trial court did not rely on this exception to the hearsay rule in admitting the Boeglin statement, Defendant nevertheless would show that the statement could not properly have been admitted under our Evidence Rule 801(d)(2)(E), N.M.R.Evid. (1978). That rule provides that the "statement by a conconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay and, thus, not precluded by operation of Rule 802.

Boeglin and Earnest were both indicted for conspiracy in the murder of David Easton and other offenses. However, the statement given by witness Boeglin was made after the commission of the offenses for which both were indicted, along with Perry Conner, as conspirators. The subject of the conspiracy alleged, the murder of Easton, was accomplished prior to the giving of the statement, along with all other acts implicated by the two conspiracy counts.

New Mexico has adopted the federal rule with respect to co-conspirator declarations. Weinstein, Evidence, section 801(d)(2)[2], at 801-186. *Compare, Dutton v. Evans*, 400 U.S. 74 (1970) (Georgia's more expansive co-conspirator statement rule not inherently violative of Confrontation Clause). New Mexico does not permit admission of statements made by a co-conspirator after the conspiracy has ended, whether through success, failure or abandonment. *See Krulewitch v. United States*, 336 U.S. 440 (1949). Once the conspiracy terminated

in the instant case, the statements allegedly made by Defendant's co-conspirators were not admissible against him. *State v. Merrick*, 54 N.C.App. 1, 283 S.E.2d 139 (1981), *aff'd*, 305 N.C. 383, 289 S.E.2d 354. Here, the evidence elicited from witness DeLuche showed that Defendant was not present for the statement given by Boeglin, (Tape 15/343), since the three co-defendants had been separated from the time of their arrest and the separation continued through the giving of the statement by Boeglin. (Tape 13/495). Where the conspiracy has terminated and one co-conspirator makes a statement outside the presence of the accused, American courts have overwhelmingly held that the statement is inadmissible in the absence of live testimony and the opportunity for cross-examination of the declarant. *See generally*, Anno. "Admissibility of Statements of Coconspirators Made After Termination of Conspiracy and Outside Accused's Presence," 4 A.L.R.3d 672, especially section 3, at 678, and cases cited in pocket part.

Courts of other jurisdictions have zealously protected the confrontation right where the alleged statement of the co-conspirator was given in the form of a confession made to police officers investigating the offense and is inculpatory to the accused. Thus, in *State v. Sykes*, 569 S.W.2d 258, 261-262 (Mo. App. 1978), the court held admission of the co-conspirator's confession constituted reversible error since the conspiracy had already terminated and the statement could not, therefore, have been made in furtherance of the conspiracy. *Accord, Com. v. McDowell*, 460 Pa. 474, 333 A.2d 872, 874-875 (Pa. Sup..1975). In *Edwards v. State*, 279 Ala. 371, 185 So.2d 393, 394 (1966), the court reversed because of failure to lay the proper predicate showing that the witness made the statement. An Alabama court again reversed in *Price v. State*, 190 So.2d 724 (Ala. Ct. App. 1966) where the statement was given after the co-conspirator had been found guilty and was serving a jail sentence, since it followed in time the end of the conspiracy and the accused was not present when the statement was made.

In *Green v. State*, 115 Ga.App. 685, 155 S.E.2d 655, 659 (1967), the court held that a statement given by the co-conspirator while in custody and not in the presence of the accused was inadmissible as hearsay because it provided a mere narrative of the events preceding termination of the conspiracy. Similarly, Boeglin's statement was not made during, or in furtherance of the conspiracy, it being a narrative given after the termination of the conspiracy while he was in custody. Such a statement would be admissible only against the declarant, Boeglin. *See State v. Patriarca*, 308 A.2d 300, 315-318 (R.I. 1973).

The trial court did not admit Boeglin's statement under the co-conspirator theory and properly so since the facts showed that the statement was not made in the course of or in furtherance of the conspiracy. Further, the State did not argue at trial that the co-conspirator rule would apply to Boeglin's statement and, thus, any claim that the evidence was properly admitted under this theory has been waived.

Reliability of the statement

In relying on *Martinez* for the proposition that Boeglin's statement could be admitted as an exception to the hearsay rule authorized by Evidence Rule 804(a)(2) and (b)(4), the trial court abused its discretion in concluding that the statement carried a sufficient indicia of trustworthiness to justify its admission. The statement being hearsay, in accord with the definition of hearsay given in Rule 801(c), N.M.R.Evid. (1978), it could only be admitted as an exception to the rule if reliable as a correct statement tending to proof the truth of the matters asserted therein.

Boeglin's statement lacks a sufficient indicia of reliability to justify admission in three important respects. First, the circumstances surrounding the taking of the statement cast doubt on the credibility of the maker and the matters asserted. The testimony showed that Boeglin made the statement after arrest; that he stated he had been using methamphetamine (Tape 15/490), but was not tested for possible effects of the drug at the time of his interrogation, even though investigator DeLuche testified that Boeglin was "hyper" (Tape 13/390-395, 408, 546; Tape 14/033, 060); and that Boeglin made the statement without having been advised by an attorney, or sworn by a magistrate. (Tape 13/370-380, 585; Tape 15/373).

Second, even if the circumstances surrounding the taking of statement did not warrant exclusion, the text of the statement itself, coupled with other evidence, demonstrates that the statement was not so contrary to the witness's interest as to justify admission under Evidence Rule 804(b)(4). The statement, while partially inculpatory as to Boeglin's participation in the entire transaction, is also exculpatory as to his involvement in the fatal wounding of the victim. The statement can actually be best construed as Boeglin's attempt to mitigate his own culpability for the principal offense alleged by stating that "Rob" had actually done the shooting. *See* State's Exhibit 39, at page 6. Moreover, the record shows that Boeglin gave other statements in which he denied participation in the offense. (Tape 15/97, 317-322). Clearly, Boeglin's inculpatory statement was sufficient to lead the police to the murder weapon and other items of physical evidence of the offense. (Tape 15/34-38). But, the statement serves as Boeglin's attempt to exculpate himself from the role of principal in the commission of the murder at the expense of the individual referred to as "Rob" and, thus, the statement cannot be judged as so against Boeglin's interest that he would not have made it unless it were true. Boeglin may have erred in assessing the legal significance of his own inculpatory admissions, but the statement demonstrates his effort to minimize his role in the offenses. Consequently, the statement lacks the requisite reliability because Boeglin's motivation in giving it undermines the very premise of reliability, since he attempted to use the statement to gain his personal freedom at the expense of the others implicated in the statement. *See*

State's Exhibit 39, at page 3. Boeglin hoped to gain his freedom by making a statement incriminating others for the offenses charged.

Third, the statement lacks reliability because neither the text of the statement, nor other evidence sufficiently serves to identify Defendant as the person referred to by Boeglin as "Rod or Rob," and then as "Rob" throughout the remainder of the statement. Counsel clearly developed this weakness in the use of the statement on re-cross, where witness DeLuche admitted that the statement included Boeglin's comment that he was not sure what "his" name was. (Tape 16/37, 88-166). While DeLuche did testify that he knew Defendant as "Rod" or "Rodney," there was no independent testimony that Boeglin had ever identified Defendant as the individual to whom he made reference in the statement. (Tape 16/46).

For these reasons, the trial court abused its discretion in overruling the defense objection to admission of the statement. (Tape 16/230). The statement was not sufficiently reliable in terms of either the declarant's motivation in making it, or in terms of its relevance in Defendant's trial, to justify admission under Rule 804, even assuming the trial court's declaration of Boeglin's unavailability under subsection (a) (2) was correct. (Tape 13/215).

The statement of co-defendant Boeglin was improperly admitted, in violation of Defendant's right of confrontation under both the federal and state constitutions, and in violation of the New Mexico Rules of Evidence. The admission of this testimony, central to the State's case against Defendant cannot be deemed harmless under the rule of *Chapman v. California*, 386 U.S. 18 (1967), and consequently, the error in its admission requires reversal.

POINT III, PETITIONER STATE OF NEW MEXICO'S ANSWER BRIEF TO THE NEW MEXICO SUPREME COURT.

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
vs. No. 15-162
RALPH R. EARNEST,
Defendant-Appellant.

POINT III

(Filed June 22, 1984)

STATE'S EXHIBIT 39, THE STATEMENT OF PHILLIP BOEGLIN, WAS PROPERLY ADMITTED INTO EVIDENCE BECAUSE BOEGLIN WAS UNAVAILABLE TO TESTIFY AND THE STATEMENT WAS SHOWN TO HAVE SUFFICIENT INDICIA OF RELIABILITY.

Defendant argues that the trial court abused its discretion and denied him his rights of confrontation and cross-examination by admitting the statement of Phillip Boeglin into evidence. The State disagrees, and argues that Boeglin's statement was properly admitted against Defendant under the standards of *Ohio v. Roberts*, 448 U.S. 56 (1980). *Roberts* held that the Sixth Amendment is not violated by the introduction of a statement inculpatory of a defendant if the declarant is unavailable to testify and the statement bears sufficient indicia of reliability. Sufficient indicia of reliability are present if the statement falls into one of the firmly rooted exceptions to the hearsay rule, or if the statement is found to contain particularized guarantees of trustworthiness. *Ohio v. Roberts, supra*, 448 U.S. at 65-66.

It appears to be undisputed that Phillip Boeglin was unavailable to testify. He was called to the stand, but refused to

answer questions concerning his activities on February 11, 1982, on the basis that it might tend to incriminate him. (Tape 11, 428-469). The State tendered a use immunity order to the trial court, which was signed. (Tape 11, 470-513). Boeglin still refused to testify concerning his activities on February 11, 1982, again citing his right to refuse to incriminate himself. (Tape 11, 528-540). The trial court explained to Boeglin that he had no privilege to refuse to testify on the basis of self-incrimination, warned Boeglin that further refusals would lead to citations for contempt and ordered him to answer. (Tape 11, 540-560). Boeglin again refused to testify as to his activities on the night in question. (Tape 11, 560-574). The jury was excused, and Boeglin's attorney argued that he should not be compelled to answer. (Tape 11, 574-end; Tape 12, 3-347). The trial court ordered Boeglin to testify, offered to purge any previous citations if he did so, and stated that he would allow a jury trial and would sentence Boeglin as if it were a first degree felony if he again refused to testify. (Tape 12, 385-484). A recess was taken so that Boeglin could confer with his attorney. (Tape 12, 503-521). Upon returning from recess, Boeglin again refused to answer the question previously asked, citing his privilege against self-incrimination. (Tape 12, 526-545). The trial court warned him that he faced contempt proceedings, noted the immunity order, and ordered him to answer. (Tape 12, 545-570). Boeglin again refused, citing his privilege against self-incrimination. (Tape 12, 570-578). The trial court cited him for contempt, referred the matter to the District Attorney's office for action, and remanded Boeglin to the custody of the Sheriff's Office. (Tape 12, 578-592). The State moved to declare Boeglin unavailable, under Rule 804(a) (2), New Mexico Rules of Evidence. (Tape 12, 601-606). After argument by counsel, the court declared Boeglin unavailable. (Tape 13, 143-145). The trial court's action clearly comported with the standards of Rule 804(a) (2). Boeglin refused to testify as to the subject matter of his statement, despite an immunity order, an order to testify and a citation

for contempt of court. *State v. Martinez*, 99 N.M. 353, 658 P.2d 428 (1983).

Boeglin's statement also demonstrated the requisite indicia of reliability. In *Ohio v. Roberts, supra,* the United States Supreme Court noted that indicia of reliability may be shown in one of two ways. First, if the statement falls within a "firmly rooted exception" to the hearsay rule, its reliability may be inferred with no further showing, 448 U.S. at 66. Secondly, that reliability may be shown through "particularized guarantees of trustworthiness." *Id.* The State believes that Boeglin's statement adequately met both of those standards.

The State sought admission of the statement as a statement against interest, pursuant to Rule 804(b) (4), New Mexico Rules of Evidence. (Tape 2, 63-95; Tape 12, 601-606; Tape 13, 270-274). The trial court apparently admitted the statement on that basis, noting that this was a statement which put the declarant in jeopardy of his life and was therefore reliable. (Tape 13, 170-191). The trial court also noted, during the hearing on a motion in limine relative to the statement, that this was a case where Boeglin came in and said that he had helped to commit first degree murder and had backed up that statement with facts, a gun and a body. The court felt that made the hearsay reliable, and took notice of the physical evidence and testimony from Defendant's first trial, which independently corroborared Boeglin's statement (Tape 2, 718-738).

Ohio v. Roberts, supra, did not specifically address whether or not a statement against interest was to be considered a "firmly rooted exception" to the hearsay rule. That Court did note that dying declarations, prior testimony, business and public record exceptions were to be considered as such. 448 U.S. at 66 N.8. Subsequent cases have held that the statement against interest exception is to be considered a firmly-rooted exception to the hearsay rule, for purposes

of Sixth Amendment analysis. See, e.g., *United States v. Katsougrakis,* 715 F.2d 769, (CA2, (1983) *cert. denied,* 104 S.Ct. 704 (1984); *United States v. Robinson,* 635 F.2d 363 (CA5, 1981); *State v. Parris,* 654 P.2d 77 (Wash., 1982).

Thus, Boeglin's statement was admitted pursuant to a "firmly rooted exception" to the hearsay rule, as required by *Ohio v. Roberts, supra.* It is clear that the statement qualified as a statement against interest. Rule 804(b) (4), New Mexico Rules of Evidence, requires that such a statement must have "so far tended to subject him to. . .criminal liability. . .that a reasonable man would not have made the statement unless he believed it to be true." Boeglin's statement meets those requirements.

As the trial court noted, Boeglin's statement amounted to a confession to first degree murder, in addition to implicating Defendant. In addition, Boeglin's statement amounted to a confession to kidnapping, conspiracy to commit murder, conspiracy to commit kidnapping and possession of marijuana. (See p.p. 4-6, 9-10, State Exhibit #39). The murder to which Boeglin confessed being a principal participant was planned through the night, and was undertaken to prevent the victim from informing as to the drug deal conducted earlier that day. (See p.p. 4-6, State Exhibit #39). Thus, Boeglin could receive the death penalty as a result of his statement. (See 31-20A-5G, N.M.S.A., 1978 Comp., 1978 Rpl. Pamp.). It is difficult to imagine a statement more thoroughly against one's penal interests. Moreover, this Court has ruled that the statement is admissible against Boeglin. (See, Decision in *State v. Boeglin,* No. 15, 243, Feb. 23, 1984). Thus the statement apparently meets the Rule's requirement that it "tend" to subject him to criminal liability. *United States v. Layton,* 720 F.2d 548, (CA9) *cert. denied,* 104 S.Ct. 1423 (1984); *State v. Parris, supra.*

Defendant argues that the statement is unreliable because Boeglin attempted to mitigate his own involvement in the

matter, and attempted to gain his freedom at the expense of his codefendants. (BIC at 27). The State disagrees with these characterizations of the statement. Boeglin admited his active participation in all phases of the crime. He admitted participating in the vote to kill Eastman. (P.5, State Exhibit #39), He admitted kicking Eastman, apparently as part of the interrogation process. (P.5, State Exhibit #39). He admitted participating in moving Eastman, who was bound at the time, from the shed to the house. (P.5, State Exhibit #39; compare 30-4-1, N.M.S.A., 1978 Comp., definition of kidnapping). He admitted participating in placing the victim in a car and driving him to a remote area to kill him. (P.6, State Exhibit #39). He admitted cutting Eastman's throat twice while Eastman was still alive after Eastman had received a gunshot wound to the head. (p.6, State Exhibit #39). The State is unable to see how it could be said that such admissions are an attempt to mitigate his involvement in the crime. It would be more accurately characterized as a brutally frank, totally inculpatory statement. Had Boeglin wished to mitigate his involvement, he could easily have described himself as an unwilling participant, responding to threats from his codefendants. He did not do so. He could have claimed that he sat passively while Earnest or Conner cut the victim's throat. Yet he admitted wielding the knife. Defendant asserts that the statement is "exculpatory as to his involvement in the fatal wounding of the victim." (BIC at 27). That argument does not bear close examination. It is true that expert testimony at trial from the pathologist showed that Eastman died from the gunshot wounds to the head, and not from the knife wounds to the throat. (Tape 19, 498-501). However, it is highly unlikely that Boeglin would be aware of such technical niceties a few hours after the homicide, and one day before the autopsy was performed. (Tape 19, 285-304). An examination of State's Exhibits 12 and 13 shows what would appear to a layman to be extremely serious cuts on the victim's throat. The police at that time seemed to believe that the victim had died from the throat wounds. (P.3, State Exhibit #39). As

stated earlier, Boeglin believed Eastman was still alive when he cut his throat. (P.6, State Exhibit #39).

It is true that case law indicates that statements to the police should be carefully scrutinized before being admitted as statements against interest, to discover if the declarant was attempting to "curry favor" with authorities. See, e.g., *United States v. Katsougrakis, supra*; *State v. Parris, supra.* However, the present case is free from any such indications of unreliability. Though Boeglin at first attempted to bargain for his freedom, the investigator quickly made it clear that he could not do so.

> "Well, I am not going to offer you your freedom. I can't offer you your freedom." P.3, State Exhibit #39.

DeLuche, the investigator then referred to his earlier statements that he could only tell the district attorney what information Boeglin had provided. (*Id.*). He repeatedly stressed that he could not offer any deals or make any promises. (P.2, State Exhibit #39). Boeglin was reminded, just before beginning his confession, that this was not a matter which would be taken lightly:

> Detective Carrasco: "Do you understand that's a homicide, it's not just a petty thing, man?"
> Boeglin: Yeah, I know it.

Boeglin then confessed. (P.4, State Exhibit #39). Perhaps most striking is the warning DeLuche gave Boeglin shortly before he began his confession:

> "Now for example, you-you say 'okay, I'm going to tell you the truth if you'll let me go,' and I say, 'Fine. Mr. Boeglin, we've got a deal,' and you tell me 'Okay, I was the one that cut his throat.' Now what kind of a deal is that? That's stupid, isn't it?" (P.3, State Exhibit #39).

Yet, within minutes of being told that he would be in serious jeopardy if he admitted cutting Eastman's throat, Boeglin admitted cutting Eastman's throat. (P.6, State Exhibit #39). This cannot be portrayed as a situation where Boeglin could have believed that he would "curry favor" by his confession. To the contrary, Boeglin was well aware that he faced the most serious of consequences, and yet admitted the very details which he knew would place him in the worst of positions. See, *United States v. Robinson, supra.*

Defendant also argues that the circumstances of the statement, such as Boeglin's apparent drug use, the custodial nature of the statement and the lack of an attorney demonstrates its unreliability. This Court has already held that the statement in question was made voluntarily, and that Boeglin freely and intelligently waived his right to silence and counsel. (Decision, *State v. Boeglin,* No. 25, 243, Feb. 23, 1984). Those issues should not be relitigated. It should also be noted that all of those factors were made known to the jury, and were presumably used in determining what weight to give to the statement. (Tape 13, 281-691, Tape 15, 54-550). Also, the jury heard the actual tape of Boeglin's statement. (Tape 14, 280-850). Thus, the jury was in a better than usual position to judge Boeglin's mental state when he gave the statement. *United States v. Layton, supra.*

Defendant last contends that Boeglin's statement is unreliable because it fails to sufficiently identify Defendant as the third person in the group that committed the crimes. The State disagrees. When Boeglin first mentioned the third person, he said:

> ". . .me and Rod or Rob, whatever his name is – Red went over to the Eastman's house. . . ." (P.5, State Exhibit #39).

From that point on, he refered to his two companions as "Rob and Red." ("Red" is codefendant Perry Conner's nickname.

(Tape 21, 545-582.) Boeglin said that "Rob and Red and me was there" when Eastman was taken for his last ride, and described where all four sat in the car. (P.6, State Exhibit #39). He then described how "we" hid the evidence, went to Red's house, cleaned up, and went to Boeglin's house. He then said that "we" got arrested. (P.6, State Exhibit #39). It is clear from his account that the two people with Boeglin when they were arrested were the two with whom he had committed the crimes. When Boeglin was arrested, he was with Perry Conner and Defendant. (Tape 10, 178-248; Tape 16, 114-116). Throughout the trial, Defendant was constantly referred to as "Rod," (Tape 10, 554-574, Tape 16, 30-38) or "Rodney" (Tape 16, 184-192). (It is also interesting to note that DeLuche could not tell whether Conner referred to Defendant as "Rob" or "Roy" during Conner's statement. Conner clarified that it was "Rodney" to whom he referred. (P.6, State Exhibit #43.) Eastman's roommate, Michael Blount, also saw the trio at a convenience store shortly after the murder and shortly before their arrest. Blount stated that the three he saw driving his roommate's car were Conner, Boeglin and Defendant. Blount came upon Eastman's body moments later. (Tape 10, 766-889). Based upon these facts the State does not believe that there was any ambiguity as to who "Rod or Rob," the third person involved in the crimes, was. It was clearly Defendant.

The State would last note that Boeglin's statement was corroborated by a wealth of evidence. Boeglin said that Red Conner was in the process of completing a drug deal with Eastman and that they wanted Eastman's roommate's motorcycle as collateral. The roommate refused, so Eastman's El Camino automobile was used as collateral instead. (P. 4-5, State Exhibit #39). All those matters were corroborated by the testimony of Eastman's roommate, Michael Blount. (Tape 10, 593-614, 637-653). The deal involved 14 grams of the drug, according to Boeglin. (P.9, State Exhibit #39). This was corroborated by Blount's testimony. (Tape 10, 637-653).

Boeglin states that they began to believe Eastman was a "narc" or informant, and that led to the murder. This is corroborated in several ways. Dana Boeglin, Boeglin's wife, testified that she saw the men that night with a stranger, whom Defendant said was a "narc". (Tape 16, 325-434). Dana Boeglin testified that Red Conner said that the man was a "narc" and that they were going to kill him. (Tape 16, 343-369, 373-381).

Boeglin, in his statement, said that he and his companions shot Eastman and cut his throat. (P.6, State Exhibit #39). Dr. Sweeney, the pathologist, testified that Eastman had cuts across his throat, and bullet wounds. (Tape 19, 332-347, 406-418). Dana Boeglin testified that Red Conner said they would "blow him away" or cut his throat. (Tape 16, 408-410).

Boeglin's statement reflects that the three first attempted to overdose Eastman on several grams of speed or "crystal," but that it only made him sick. (P. 5-6, State Exhibit #39). Valerie Knight, a toxicologist, testified that Eastman's blood showed enough methamphetamine to kill a person, but that some people can build enough tolerance to survive such an amount. (Tape 19, 119-145). Dana Boeglin testified that Red said they would overdose the "narc". (Tape 16, 413-416).

Boeglin said that Eastman was beaten before they killed him. (P. 5-6, State Exhibit #39). Dr. Sweeney found bruises on Eastmans face, arms and legs, made before his death. (Tape 19, 353-357).

Boeglin stated that the first bullet fired hit Eastman between the eyes. (p.6 State Exhibit #39). Dr. Sweeney testified that Eastman had a bullet wound between the eyes. (Tape 19, 332-347).

Boeglin described in his statement how the gun jammed when they tried to shoot Eastman. (P.6, State Exhibit #39). Nelson Welch, a firearms expert, testified that State's Exhibit #19, the gun recovered with Boeglin's aid, jammed and malfunctioned

more than any similar pistol he had ever seen. (Tape 18, 61-77).

Boeglin said that he cut Eastman's throat twice, but that the knife did not seem to cut well. (P.6, State Exhibit #39). Dr. Sweeney testified that Eastman had two cuts across his throat, one major and the other smaller. Dr. Sweeney stated that the cuts did not go deep enough to sever the major veins and arteries. (Tape 19, 347-353, 406-418).

Boeglin stated that it was still dark, but before dawn when they left with Eastman to kill him. (P.8, State Exhibit #39). Marilyn Sullivan, the deputy medical examiner, testified that she examined Eastman at about 7:15 a.m., and that he had been killed within the previous four hours. (Tape 9, 684-705; Tape 10, 50-56).

Boeglin said that they killed Eastman next to the road, on the Loving Highway. (P.6, State Exhibit #39). Deputy Rodriguez testified that Eastman's body was found next to the road between Loving and Otis. (Tape 7, 175-199).

Boeglin said in his statement that the gun and knife used were hidden by a road near Black River under a rock. (P.7, State Exhibit #39). Deputy Carrasco testified that he recovered a gun, State Exhibit #19, and a knife, State's Exhibit #20, near Black River under a rock. (Tape 9, 57-178). Dr. Sweeney testified that he recovered State's Exhibits #27 and #28 from Eastman's head. (Tape 19, 447-480). Nelson Welch testified that State's Exhibits #27 and #28 were bullets that had been fired by State's Exhibit #19. (Tape 18, 81-97).

This corroboration underscores the reliability of Boeglin's statement. This corroboration clearly satisfies the standard of "particularized guarantees of trustworthiness" which is used as the alternative test for reliability in *Ohio v. Roberts, supra.*

In summary, Boeglin was unavailable to testify, and his statement was admissible as a statement against interest, a

"firmly rooted exception" to the hearsay rule. In addition, the statement, by virtue of its self-incriminatory nature and thorough corroboration, had "particularized guarantees of trustworthiness". Defendant's Sixth Amendment right of confrontation and cross-examination were not violated by its introduction. *Ohio v. Roberts, supra.*

OPINION OF THE NEW MEXICO SUPREME COURT IN
***STATE v. EARNEST*, 703 P.2d 872 (1985)**

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v. No. 15,162
RALPH R. EARNEST,
Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY
Harvey W. Fort, District Judge
(Filed March 4, 1985)

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J. Thomas Sullivan, Appellate Defender
Santa Fe, New Mexico — For Appellant

Gary C. Mitchell
Ruidoso, New Mexico — Trial Counsel

Paul Bardacke, Attorney General
William McEuen, Assistant
Attorney General
Santa Fe, New Mexico — For Appellee

OPINION

RIORDAN, Justice.

Ralph Rodney Earnest (defendant), Phillip Boeglin (Boeglin), and Perry Connor (Connor) were charged with murder, conspiracy to commit murder, kidnapping, conspiracy to distribute a controlled substance (methamphetamines), and possession of a controlled substance (methamphetamines). Defendant, Boeglin, and Connor were each tried separately. During the course of defendant's trial before a jury, a mistrial was declared. Defendant was subsequently retried, convicted on all counts and sentenced to life imprisonmment for the murder, eighteen years for conspiracy to commit murder (with nine years suspended),

nine years for kidnapping, eighteen months for conspiracy to distribute a controlled substance and three years for possession of a controlled substance. All of these sentences were to run consecutively to each other and consecutively to the life sentence. From this judgment and sentence defendant appeals. We reverse and remand for a new trial.

The issues we address are:

I. Whether the trial court erred in subjecting defendant to a retrial after defendant's first trial ended in a mistrial.

II. Whether the trial court erred in refusing defendant's request for a hearing on his motion to dismiss the indictment on double jeopardy grounds or refusing to grant an interlocutory appeal on this issue.

III. Whether admission of the prior statement of co-defendant Boeglin violated defendant's right to confront the witness against him.

IV. Whether the prosecutor's reference to defendant's post-arrest silence deprived defendant of a fair trial.

V. Whether the trial court erred in allowing the district attorney's investigator to testify as to co-defendant Boeglin's behavior at the time of his confession.

VI. Whether the trial court erred in ordering the attorney for co-defendant Connor to testify in rebuttal to Connor's testimony where the attorney/client privilege was never waived.

We find it unnecessary to address a seventh issue raised on appeal since it is unlikely to become a factor on retrial.

Facts.

The offenses charged were committed on the night of February 11, 1982 and the early morning hours of February 12, 1982.

Defendant and his two co-defendants were arrested on the morning of February 12, 1982. On that same day, co-defendants Boeglin and Connor both gave statements to police officers. Each of these statements was tape recorded and subsequently transcribed. Boeglin's statement describes the events leading up to and including the murder. It incriminates defendant, Boeglin, and Connor.

I. Declaration of Mistrial.

Defendant's first trial ended when the trial court declared a mistrial. The order declaring mistrial indicates the mistrial was granted pursuant to defendant's motion and a finding that "manifest necessity" existed for a mistrial. In declaring a mistrial in this manner, the court retained jurisdiction to retry defendant.

Defense counsel, prior to the declaration of mistrial, had twice moved for mistrial. The trial court had reserved ruling and had taken these motions under advisement. After defendant's first motion for mistrial, the trial court cautioned defense counsel that defendant would be better off continuing with the trial and seeking a directed verdict, instead of moving for mistrial and facing a retrial. Despite this advice, defense counsel chose to stand on the motion. Later in the proceedings, defense counsel again moved for mistrial, and again the trial court noted that defense counsel was placing defendant in a situation where he could be retried rather than acquitted and dismissed if a directed verdict was granted. Despite these repeated warnings from the bench, defense counsel made no attempt to withdraw either of the motions for mistrial. Later, when the trial court announced that it was declaring a mistrial based on defense counsel's previous motions, defense counsel attempted to withdraw the previous mistrial motions. Defense counsel argued that a mistrial was inappropriate in light of the state of the evidence and reminded the trial court that it had previously indicated the appropriateness of directing a verdict. The trial

court responded that defense counsel had been warned that the outstanding motions for mistrial were not in defendant's best interest because, at the time when they were made, the State had not shown all of the elements of any of the offenses charged.

It is the general rule that "[a] mistrial not moved for or consented to by the defendant must be based upon a manifest necessity or jeopardy attaches preventing retrial." *State v. Castrillo*, 90 N.M. 608, 613, 566 P.2d 1146, 1151 (1977). "Different considerations obtain, however, when the mistrial has been declared at the defendant's request." *U.S. v. Dinitz*, 424 U.S. 600, 607 (1976). In this event, "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution." *U.S. v. Jorn*, 400 U.S. 470, 485 (1971). In the instant case, defense counsel had made two motions for mistrial prior to the time the trial court declared a mistrial. Therefore, it was not error to subject defendant to a second trial.

On appeal, defendant asserts that defense counsel effectively withdrew the two motions for mistrial. We disagree. Defense counsel knew that a directed verdict and acquittal were possible for defendant. Defense counsel was twice warned of the results if the mistrial motions were maintained. Yet, having persisted in his requests for mistrial, defendant now complains of the results obtaining from such motions. We hold that defense counsel was given ample opportunity prior to the declaration of mistrial to withdraw the motions and failed to do so. *See U.S. v. Crouch*, 566 F.2d 1311 (5th Cir.1978).[1]

Defendant asserts that no manifest necessity existed. Again we disagree. "It is a well settled rule . . . that the requisite manifest necessity which prevents a declaration of mistrial from barring reprosecution will generally be found where the mistrial is declared at the request of the defendant." *MacPherson v. State*, 533 P.2d 1103, 1104 (Alaska), *cert. denied*, 423 U.S. 871 (1975). In the instant case, defense counsel twice moved for mistrial, twice ignored warnings from the bench regarding the

effects of such motions, and failed to withdraw those motions. Defense counsel's motions provided the "manifest necessity" required to declare a mistrial. Thus, defendant was properly subjected to retrial.

II. Failure to Grant Hearing or Interlocutory Appeal.

Defendant asserts that he was entitled, prior to his retrial, to a hearing or an interlocutory appeal regarding his motion to dismiss on double jeopardy grounds. *State v. Mestas*, 93 N.M. 765, 605 P.2d 1164 (Ct.App.1980), demonstrates that the Court of Appeals has authority to accept such an application for interlocutory appeal. Therefore, defendant could have filed an interlocutory appeal with the Court of Appeals following the trial court's denial of his motion to dismiss. However, the record does not show that defendant ever made such an attempt. Thus, defendant waived any right he may have had to an interlocutory appeal on this issue. Regardless, we hold that it was not error to retry the defendant.

III. Admission of Co-defendant's Statement.

The State called co-defendant Boeglin to testify against defendant. Boeglin refused to testify on Fifth Amendment grounds, and the trial court granted him use immunity for his testimony. However, despite this grant of immunity, Boeglin still refused to testify and was found in direct contempt by the trial court. The State then moved to have Boeglin declared unavailable as a witness. This motion was granted over defense objection. The trial court then allowed Boeglin's taped statement to be played before the jury and allowed the jury to use individual transcripts of the statement to better follow the taped statement. Defendant objected that the use of the statement was a violation of defendant's right to confront the witness and engage in meaningful cross-examination. Over this objection, the statement was presented to the jury.

It is clear in the instant case that Boeglin was unavailable to testify. NMSA 1978, Evid.R. 804(a)(2) (Repl.Pamp.1983).

Defendant relies on *Douglas v. Alabama*, 380 U.S. 415 (1965), in support of his claim that admission of Boeglin's statement violated his right to confront and cross-examine the witness. We find *Douglas v. Alabama* directly on point. There, an accomplice was called as a state's witness and refused to testify on Fifth Amendment grounds. The accomplice had previously confessed to the crime, and such confession implicated Douglas. The state was allowed, in the jury's presence, to read the confession. Douglas was found guilty. On appeal, it was held that Douglas' right to confront and cross-examine the witness against him had been violated.

In support of the admission of Boeglin's prior statement, the State relies on *Ohio v. Roberts*, 448 U.S. 56 (1980). There, the Supreme Court fashioned a test whereby prior statements could be admitted if: (1) the witness is unavailable, and (2) the prior statement bears adequate indicia of reliability, in that it falls within one of the "firmly rooted" exceptions to the hearsay rule, or the statement has particularized guarantees of trustworthiness. *Id.* at 66. Under the facts of *Ohio v. Roberts*, the prior statement sought to be introduced had been made at a preliminary hearing where an opportunity to cross-examine the witness existed. It is in this sense that the instant case (and *Douglas v. Alabama*) are distinguishable from *Ohio v. Roberts*. Two 10th Circuit Court of Appeals' opinions help to clarify this distinction.

In *U.S. v. Allen*, 409 F.2d 511 (10th Cir.1969), it was determined that the proper test in deciding whether transcripts of preliminary hearing testimony could be properly admitted at trial (where the witness refused to testify) was *opportunity* for full and complete cross-examination of that witness at the preliminary hearing. *Id.* at 613. Thus, it can be logically inferred that where no such opportunity to cross-examine the witness existed, then admission of a prior statement is a denial of a defendant's confrontation rights.

Further, in *U.S. v. Rothbart,* 653 F.2d 462, 465 (10th Cir. 1981), the Court, in discussing the *Ohio v. Roberts* test for admission of prior statements, limits its application to statements and/or testimony made at an earlier *judicial proceeding.*

In the instant case, Boeglin's prior statement made to police officers shortly after his arrest was not made during the course of any judicial proceeding and defendant was in no way afforded an opportunity to cross-examine Boeglin. We therefore determine that admission of Boeglin's prior statement was highly prejudicial, violated defendant's confrontation rights, and deprived defendant of meaningul cross-examination. Defendant's conviction is therefore reversed and the case remanded for a new trial.

In so holding, we adopt the 10th Circuit Court of Appeals' interpretation in *Rothbart* of *Ohio v. Roberts,* which limits admission of prior statements to those that were made at an earlier judicial proceeding where the defendant was given the opportunity to fully cross-examine the witness against him.[2]

IV. Prosecutor's Reference to Defendant's Silence.

As his fourth contention on appeal, defendant argues that he was denied a fair trial in that the prosecutor erroneously inquired into defendant's post-arrest silence while cross-examining the defendant. We disagree.

The evidence indicates that the prosecutor's references to defendant's silence were prompted by earlier implications made by defense counsel that defendant had always maintained his innocence. This being the case, there was no error. *State v. Molina,* 101 N.M. 146, 679 P.2d 814 (1984).

V. Admission of Investigator's Testimony.

Boeglin's statement was admitted through an investigator for the Eddy County District Attorney's office who was present at the time Boeglin made the statement. The prosecution asked the investigator if he had formed an opinion as to Boeglin's

state of mind at the time Boeglin made the statement. Defense counsel objected on the ground that the witness was not properly qualified as an expert. The objection was overruled. The investigator then testified that Boeglin had appeared "hyper."

On appeal, defendant asserts that the investigator was unqualified under NMSA 1978, Evid. Rule 702 (Repl.Pamp.1983), to give an expert opinion regarding Boeglin's state of mind. However, defendant ignores the effect of NMSA 1978, Evid. Rule 701 (Repl.Pamp.1983). That Rule allows admission of lay testimony in the form of opinions that are rationally based upon the witness's perceptions. Thus, the investigator's testimony was properly admitted.

VI. Waiver of Attorney-Client Privilege.

As the last point of error, defendant asserts that the trial court erred in ordering the attorney for co-defendant Connor to give rebuttal testimony to Connor's testimony. NMSA 1978, Evid. Rule 503(c) (Repl.Pamp.1983), bars defendant's claim. Connor waived the privilege when he testified regarding what he did *not* tell his attorney. Defendant may not assert another's privilege.

Conclusion.

We determine that admission of co-defendant Boeglin's prior statement constitutes reversible error, and defendant's convictions for murder, conspiracy to commit murder, and kidnapping are set aside and he is granted a new trial.

IT IS SO ORDERED.

/s/ William Riordan
WILLIAM RIORDAN, Justice

WE CONCUR:

DAN SOSA, JR., Senior Justice

/s/ Mary C. Walters
MARY C. WALTERS, Justice

FOOTNOTES

[1] We in no way create a rule requiring the trial court to inquire of defense counsel whether they wish to stand on their previous mistrial motions or requiring the trial court to warn defense counsel of the effects of their previous mistrial motions.

[2] *State v. Martinez*, 99 N.M. 353, 658 P.2d 428 (1983) (a case similar to the instant case), is distinguishable on its facts since the witness against Martinez later testified at trial, and Martinez was given an opportunity to cross-examine the witness.

PETITIONER STATE OF NEW MEXICO'S MOTION FOR REHEARING IN THE NEW MEXICO SUPREME COURT.

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
vs. No. 15,162
RALPH R. EARNEST,
Defendant-Appellant.

MOTION FOR REHEARING

(Filed March 14, 1985)

The State of New Mexico, through its appellate counsel, William McEuen, Assistant Attorney General, respectfully moves for a rehearing in the above referenced matter, pursuant to Rule 602, Rules of Appellate Procedure for Criminal Children's Court, Domestic Relations and Workman's Compensation Cases. As grounds, the State submits the following:

1. The Opinion was filed on March 4, 1985, and reverses Defendant's conviction because of the introduction of the confession of a non-testifying co-defendant, Phillip Boeglin.

2. The Opinion rejects the State's argument on this point by interpreting *Ohio v. Roberts*, 448 U.S. 56 (1980) as being applicable only to the admission of testimony or statements from a previous judicial proceeding in which there was a full opportunity for cross-examination, and thus being inapplicable to the admission of Boeglin's extra-judicial confession.

3. The State believes that this Court has misapprehended the extent of the holding in *Ohio v. Roberts*, that *Roberts* is applicable to the introduction of extra-judicial statements, and that *Roberts'* standards justify the admission of Boeglin's statement against Defendant.

4. The argument on this matter is contained in the Brief in Support of this Motion, attached hereto.

WHEREFORE, the State respectfully requests that this Court reconsider its Opinion herein as to the admissibility of Boeglin's statement, apply the standards of *Ohio v. Roberts* to the question of its admissibility, rule that the statement is admissible under those standards, and affirm Defendant's convictions.

Respectfully submitted,

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/s/ William McEuen
WILLIAM McEUEN
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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was mailed to opposing counsel of record this 14th day of March, 1985.

/s/ William McEuen
Assistant Attorney General

NEW MEXICO SUPREME COURT'S ORDER DENYING PETITIONER'S MOTION FOR REHEARING

IN THE SUPREME COURT OF THE
STATE OF NEW MEXICO
Thursday, March 21, 1985

NO. 15,162

STATE OF NEW MEXICO,
Plaintiff-Appellee,
vs.
RALPH R. EARNEST,
Defendant-Appellant.

This matter coming on for consideration by the Court upon Motion of Appellee for rehearing, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion of Appellee for Rehearing is hereby denied.

PETITIONER'S

BRIEF

G

Supreme Court, U.S.
FILED
DEC 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-162 (9)

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF NEW MEXICO,
Petitioner,

v.

RALPH RODNEY EARNEST,
Respondent.

PETITIONER'S BRIEF ON THE MERITS

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VERGARA PRINTING CO. · SANTA FE, NEW MEXICO

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QUESTION PRESENTED

Does the Sixth Amendment require the exclusion at trial of an uncross-examined hearsay statement without regard to its indicia of reliability?

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No. 85-162

IN THE

Supreme Court of the United States

October Term, 1984

STATE OF NEW MEXICO,
Petitioner,

v.

RALPH RODNEY EARNEST,
Respondent.

PETITIONER'S BRIEF ON THE MERITS

OPINION BELOW

The opinion of the New Mexico Supreme Court, reported at 703 P.2d 872 (1985), appears in the Appendix at 48-56.

JURISDICTION

This judgment of the New Mexico Supreme Court was entered on March 4, 1985. App. at 48. A timely motion for

rehearing was denied on March 21, 1985. App. at 59. Petitioner received an extension of time to file the petition for certiorari through and including June 19, 1985, in Order No. A-849, by the authority of Associate Justice Byron White, Circuit Justice for the Tenth Circuit wherein petitioner is located. This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . . ."

Constitution of the United States, Fourteenth Amendment: ". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

On February 12, 1982, the body of David Eastman was found next to a rural highway near Carlsbad, New Mexico. Tape 10, 9/83, 766-889.[1] Eastman's throat had been cut and he had two gunshot wounds to the head. Tape 19, 9/83, 332-347, 406-418. Approximately three hours later, respondent Ralph Rodney Earnest and codefendants Phillip Boeglin and Perry "Red" Conner were arrested driving Eastman's El Camino pickup. Tape 10, 9/83, 178-248; Tape 16, 114-116. That afternoon, codefendant Boeglin requested to speak to the district attorney's staff, and gave a statement describing the

[1] Criminal trials in New Mexico are recorded on cassette tape, which serves as the official record on appeal. Rule 16, Rules Governing the Recording of Judicial Proceedings, N.M.S.A., 1978 Comp. Petitioner has cited to the record tapes by tape number, and the counters as they appear on a Lanier Model P-88/T transcribing machine, which registers approximately 900 counters per tape side.

homicide of Eastman. Tape 14, 90-112. The statement was incriminatory as to all three codefendants, and included Boeglin's confession to cutting Eastman's throat and Boeglin's statement that respondent had fired one of the bullets which struck Eastman in the head. State's Exhibit No. 39, App. at 17.

Respondent's first trial resulted in a mistrial. Prior to respondent's second trial, counsel for petitioner and respondent argued the admissibility of Boeglin's statement. Petitioner argued that Boeglin's statement was a statement against penal interest, as defined by Rule 804(b)(4) of the New Mexico Rules of Evidence. The trial court noted that Boeglin's statement was strongly self-incriminatory, and took note of the corroborating evidence from the first trial, but reserved a final ruling until admission was moved at trial. Tape 2, 5-95, 718-758.

The state called Boeglin to the stand but he refused to answer questions concerning his activities on February 11, 1982, citing his privilege against self-incrimination. Tape 11, 457-469. At the state's request, the trial court granted use immunity to Boeglin, but he again refused to testify. Tape 11, 477-513; App. at 8-9. The trial judge explained to Boeglin that his privilege against self-incrimination did not allow him to refuse to testify in the face of a grant of use immunity, warned him that further refusals would be punished as contempt of court, and ordered him to testify. Boeglin continued his refusals. Tape 12, 526-578. He was cited for contempt and excused from the witness stand. Tape 12, 578-592. The state moved the trial court to declare Boeglin unavailable pursuant to Rule 804(a)(2) of the New Mexico Rules of Evidence, and the motion was granted. Tape 12, 601-606; Tape 13, 143-145.

The state then called Dennis DeLuche, an investigator for the district attorney's office. DeLuche described receiving a

message several hours after Boeglin's arrest on February 12, 1982, indicating that Boeglin wished to speak to him. Tape 14, 90-112. He described taping the subsequent statement and authenticated a tape and a transcript of that tape. Tape 14, 107-153. They were admitted as State's Exhibits No. 39A and No. 39, respectively. Tape 13, 742-799; Tape 16, 146-160. State's Exhibit No. 39A was played for the jury, which was allowed to follow the tape on Exhibit No. 39, after being cautioned to rely upon the tape rather than the transcript. Tape 14, 246-255.

The statement described a drug deal between Red Conner and David Eastman. Boeglin and respondent Earnest accompanied Conner during the negotiations, which took place at Eastman's home.[2] App. at 15. Conner received Eastman's pickup as collateral for the amount owed to Conner for the drugs he sold to Eastman, after Eastman's roommate refused to allow his motorcycle to be used as collateral. App. at 15.

After the deal was struck, Boeglin's statement reflects that he, Conner and Earnest became worried that Eastman was a "narc", or informant. Eastman was brought to Conner's house and questioned. App. at 15. Eastman was then tied up while inquiries were made by telephone to people who had known Eastman previously in prison. Conner, Earnest and Boeglin

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2 During the statement, Boeglin is unsure as to whether the person with him and Conner was named "Rod" or "Rob". App. at 15. The transcription of his taped statement usually refers to that person as "Rob". Earnest was known as "Rod" or "Rodney." Tape 16, 9/83, 30-38; 184-192. However, it is clear that the person in question was Earnest. Boeglin's statement reflects that "Rod or Rob" was the person who went to Eastman's home with Conner and Boeglin to consumate the drug deal, and was the person arrested with Conner and Boeglin the next day. App. at 15-17. Independent evidence, including Earnest's own admission, showed that person was Earnest. Tape 10, 554-574; Tape 19, 178-211; Tape 23, 823-865; Tape 24, 190-211, 371-383.

took a vote at one point on killing Eastman but later changed their minds and decided to let him go. App. at 16. Information was then received that Eastman was thought to be an informant by a previous associate. App. at 16.

It was then decided to attempt to overdose Eastman. A four gram dosage of "crystal" was prepared, and Eastman apparently injected himself with it. App. at 17. However, he got sick, but did not die. App. at 17. Conner, Boeglin and Earnest then took Eastman to a rural area near Loving, New Mexico in Eastman's pickup. Conner took Eastman out and beat him at one point. App. at 17. After driving further, Conner pulled the pickup over. Boeglin's statement describes how he was on the outside end of the seat, and apparently attempted to exit prematurely, falling on the ground. Eastman tried to get out the door, but was shot between the eyes by Earnest. Boeglin then attempted to cut Eastman's throat, because he appeared to still be alive. App. at 17. The knife did not seem to cut well, so he cut again, then dropped the knife. App. at 17. The gun malfunctioned several times, and had to be reloaded before Eastman could be shot again. App. at 17. Someone shot Eastman again, but Boeglin was not watching and did not know who. App. at 17.

Boeglin, Conner and Earnest drove to another rural area where Conner and Earnest hid the gun under a rock. App. at 18. After going to Conner's home, then Boeglin's home, the three were stopped by police and arrested. App. at 17.

The state presented other evidence to corroborate the details of the statement. Michael Blount, David Eastman's roommate, testified to observing the drug deal involving Eastman and Conner, who was accompanied by Boeglin and Earnest. Tape 10, 9/83, 554-653. Blount testified that Eastman left sometime that night and never returned. Tape 10, 9/83, 766-783. At about 6:20 a.m. the next day, Blount encountered Earnest, Conner and Boeglin at a convenience store driving

Eastman's pickup. Tape 10, 9/83, 810-831. Blount and his work crew came upon Eastman's body a short time later on their way to work. Tape 10, 9/83, 843-889.

Phillip Boeglin's wife, Dana Boeglin, testified for the state. She recounted going to Conner's home with Conner's girlfriend on the night of February 11. Tape 16, 9/83, 204-243. Her husband, Phillip Boeglin, and Earnest were there. Earnest had a gun, and was sitting across from a man Mrs. Boeglin did not know. Tape 16, 231-287. Earnest told her that they thought the man was a "narc." Tape 16, 325-343. Red Conner arrived at the house and also stated that the man was a "narc." Tape 16, 342-369. Conner said that they would overdose the "narc" on drugs, or cut his throat and "blow him away." Tape 16, 408-416. Mrs. Boeglin and Conner's girlfriend spent the night at the Boeglin home, and did not see Conner, Earnest and Phillip Boeglin again until the next morning. Tape 16, 243-252. Conner told his girlfriend that she was to tell the police, if necessary, that Conner, Boeglin and Earnest had played cards all night. Tape 16, 525-569.

A toxicologist testified that Eastman's blood contained a potentially fatal amount of methamphetamine but noted that a person could develop a sufficient tolerance for the drug and survive such a dose. Tape 19, 119-154.

A pathologist testified that Eastman had two gunshot wounds to the head, one of which was between his eyes. Tape 19, 332-347. The pathologist described two cuts across Eastman's throat and noted that they had not gone sufficiently deep to cut the major arteries. Tape 119, 347-353, 406-418. In addition, Eastman had bruises on his face, arms and legs, which had been made prior to his death. Tape 19, 353-357. The pathologist identified two bullets removed from Eastman's head. Tape 19, 447-480, 501-511.

Deputy Carrasco testified that he picked up several live .25 caliber rounds near Eastman's body. Tape 8, 694-862. Carrasco also accompanied Boeglin to a large rock where a .25 caliber pistol, and a knife were hidden. Tape 9, 57-80.

A firearms expert testified that the two bullets removed from Eastman's head had been fired by the gun found under the rock. Tape 18, 81-97. He also testified that the gun malfunctioned frequently. Tape 18, 61-77. The live rounds found near Eastman's body bore marks which were consistent with having been worked through the pistol's action. Tape 18, 23-61.

Respondent attacked the state's case through cross-examination and presentation of defense witnesses. DeLuche was cross-examined concerning Boeglin and his statement. DeLuche acknowledged that Boeglin stated he had used methamphetamine the previous day, but stated that Boeglin had been able to calm himself down and appeared in control. Tape 15, 450-458, 545-550. DeLuche was also questioned as to Boeglin's references to "Rod" or "Rob" as the person with whom he and Conner committed the murder. Tape 16, 48-61. On redirect, DeLuche explained that Earnest was known as "Rod" or "Rodney", and that Earnest had been the third person with Boeglin and Conner when they were arrested. Tape 16, 9/83, 30-39, 114-116. On cross-examination, Dana Boeglin stated that the gun Earnest held appeared larger than the gun introduced at trial, and that Earnest had not been pointing the gun directly at anyone. Tape 16, 680-688. She also stated that Earnest had never said anything about killing anyone. Tape 16, 709-713.

A former attorney for Boeglin testified for the defense. He testified to seeing Boeglin shortly after he gave the statement implicating himself and Earnest. He described Boeglin as depressed, frightened, and physically drained. Tape 20,

347-388. He stated that Boeglin seemed to be "in and out", and that he was all right at times but had trouble concentrating at other times. Tape 20, 389-406. Red Conner testified for the defense and claimed to have killed Eastman in self-defense during a fight. Tape 21, 741-796. Conner testified that Earnest was not with him at the time of the killing and had nothing to do with the incident. Tape 21, 864-874; Tape 22, 54-65. Conner admitted on cross-examination that he had plead guilty to murder and to conspiring with Earnest and Boeglin to commit murder. Tape 22, 157-172.

Respondent Earnest also testified on his own behalf. He denied any involvement in the murder. Tape 24, 122-133. He testified that the gun Dana Boeglin saw was Eastman's gun, which Eastman was showing him. Tape 24, 56-69. He claimed that Eastman left with Boeglin and Conner, and that Boeglin and Conner returned the next morning alone. Tape 24, 82-100. On cross-examination, Earnest admitted a previous conviction for burglary. Tape 24, 558-566.

Respondent was convicted of murder, conspiracy to commit murder, kidnapping, conspiracy to distribute controlled substances, and possession of controlled substances. He received consecutive sentences amounting to life imprisonment, plus twenty-two years and six months. App. at 24-25. He appealed his convictions to the New Mexico Supreme Court, arguing, among other things, that the admission of Boeglin's statement violated his right to confront witnesses pursuant to the Sixth and Fourteenth Amendments of the Constitution of the United States. App. at 26-36.

Petitioner argued on appeal that admission of Boeglin's statement was governed by the standards of *Ohio v. Roberts,* 448 U.S. 56 (1980). Petitioner argued that the declarant was unavailable, that the statement against penal interest exception was a firmly rooted exception to the hearsay rule, and that

the corroborating evidence and other circumstances amounted to particularized guarantees of trustworthiness. App. at 37-47.

The New Mexico Supreme Court reversed respondent's convictions, holding the admission of Boeglin's testimony amounted to a denial of confrontation. That Court agreed that Boeglin was unavailable, but refused to apply the indicia-of-reliability test from *Ohio v. Roberts, supra,* to the statement. The Supreme Court of New Mexico ruled that *Roberts* supports only the admission of prior judicial statements or testimony, citing *United States v. Rothbart,* 653 F.2d 462 (10th Cir. 1981). That Court further ruled that the absence of an opportunity for full cross-examination renders admission of a statement violative of confrontation rights, citing *United States v. Allen,* 409 F.2d 611 (10th Cir. 1969). The Supreme Court of New Mexico held that this case was controlled by *Douglas v. Alabama,* 380 U.S. 415 (1965), which required a finding that respondent's right of confrontation was violated. App. at 48-56. Petitioner's motion for rehearing on this issue was denied without specification of reasons. App. at 57-59.

SUMMARY OF THE ARGUMENT

I. The opinion of the New Mexico Supreme Court held that confrontation requires an opportunity to cross-examine the declarant. It held that *Ohio v. Roberts'* indicia-of-reliability test can only be applied to prior testimony where the accused had an opportunity to cross-examine the declarant.

That holding would inflexibly exclude almost all hearsay from criminal trials. This Court has avoided that overly-literal interpretation of the Confrontation Clause in the series of cases from *California v. Green,* 399 U.S. 149 (1970), to *Ohio v. Roberts,* 448 U.S. 56 (1980). Instead, in *Ohio v. Roberts,* this Court has described the competing interests invoked by hearsay-confrontation issues, and embarked on a gradual and

careful process of seeking accommodation of those interests. To help carry that process forward, the Court described how indicia of reliability could be used to screen hearsay evidence and assure that the underlying purpose of the Clause is not violated by the admission of hearsay. *Ohio v. Roberts,* 448 U.S. at 62-65.

The indicia-of-reliability test should be used to determine the admissibility of hearsay which is not subjected to cross-examination. Use of the test affords the flexibility to continue the gradual process of accommodating the competing interests implicated by hearsay-confrontation questions, and assures that the Confrontation Clause's concern for a means to test the truthfulness of adverse evidence is preserved. Use of the indicia-of-reliability test on uncross-examined hearsay avoids the rigid equation of cross-examination and confrontation, an equation which would paralyze the development of evidentiary law and prevent the introduction of patently reliable hearsay evidence in particular cases.

This Court has taken a similar approach in the analogous area of unnecessarily suggestive pretrial identification procedures. Rather than inflexibly excluding all such evidence, the Court has adopted a test which examines the totality of the circumstances and admits obviously reliable identifications, *Manson v. Brathwaite,* 432 U.S. 98 (1977). In doing so, the Court stressed the inherent weaknesses of per se exclusionary rules. Similarly, a flexible reliability inquiry should be the preferred way to address confrontation problems in uncross-examined hearsay, since the presence of adequate indicia of reliability will effectuate the Clause's mission of assuring a means of testing the trustworthiness of the evidence.

Douglas v. Alabama, 380 U.S. 415 (1965), should not be a bar to the admission of uncross-examined hearsay under the indicia-of-reliability test. *Douglas'* confrontation problems

stemmed from significant prosecutorial misconduct, which caused the defendant to be convicted upon inuendo from unanswered questions. In *Douglas,* there was no actual evidence of the out-of-court statement at issue because of the prosecutor's improper actions. Here, the actual tape of the statement was introduced, together with evidence describing its circumstances and corroborating its details. Unlike *Douglas,* there were means by which the statement's accuracy could be tested.

II. The indicia-of-reliability test provides an appropriate means for determining the admissibility of the statement introduced against respondent Earnest. The statement bears many of the traditional indicia which have been held to assure the reliability of uncross-examined statements against penal interest. The statement is also corroborated in considerable detail by independent evidence.

The statement was given to police without any promises of leniency or offers to plea bargain. It is a brutally frank narrative of the murder and its surrounding circumstances, given about twelve hours after the events took place. It includes a confession to cutting the victim's throat by the declarant, as well as details of the declarant's participation in kidnapping and conspiracy.

The declarant was made aware that anything he said would be used against him, and that the police were concerned with finding the the person who cut the victim's throat.

These are the type of factors which are considered reliable enough to support the hearsay exception for statements against penal interest. That hearsay exception is now widely recognized and exists in the Federal Rules of Evidence and those of many states. Courts have gained experience in working with that hearsay exception and have developed by precedent standards for examining the reliability of uncross-examined state-

ments against penal interest. Courts have applied *Roberts'* indicia-of-reliability test to such evidence, and have used the test to admit or exclude particular statements.

In addition to that means of evaluating reliability, most courts scrutinize such statements for particularized guarantees of trustworthiness, such as corroborating evidence. Petitioner believes that such an inquiry is appropriate for the statement at issue, and can point to factors which would indicate the trustworthiness of the statement.

The statement was tape-recorded and was given less than a day after the events described. Witnesses corroborated the drug deal between the victim and the defendants, and respondent's role in the deal.

Testimony corroborated that defendants, including respondent, became suspicious of the victim and that respondent Earnest was armed and believed that the victim was a "narc." The details of the killing were corroborated, including the number and type of wounds, the depth of the knife wounds, the weapons used, the unsuccessful attempt to fatally overdose the victim on drugs, the time and place of the murder, the location of the murder weapons and the motive for the killing.

The circumstances of the statement and its details thus provide an adequate basis for determining its accuracy and truthfulness, even without the opportunity to cross-examine the declarant. The New Mexico Supreme Court should be reversed, and instructed to apply the indicia-of-reliability test to the statement of Phillip Boeglin in order to determine whether its admission would violate respondent Earnest's right of confrontation.

ARGUMENT

INTRODUCTION

In *Ohio v. Roberts,* this Court was "called upon to consider once again the relationship between the Confrontation Clause and the hearsay rule with its many exceptions." *Ohio v. Roberts,* 448 U.S. 56, 62 (1980). At issue was the admissibility of preliminary hearing testimony from an absent declarant. The Court held that the prior testimony was admissible, despite the protections of the Confrontation Clause, and set forth a two-part test for the admission of hearsay in compliance with a defendant's right of confrontation. First, the hearsay declarant must be unavailable to testify at trial. Second, the hearsay must bear adequate indicia of reliability. *Ohio v. Roberts,* 448 U.S. at 66.

In *Ohio v. Roberts,* the Court found adequate indicia of reliability because the hearsay statements had been made in a judicial setting and subjected to the equivalent of significant cross-examination. 448 U.S. at 70-71. The Court, however, also formulated a "general approach" to hearsay-confrontation problems. That general approach includes the possibility that hearsay could be reliable without any form of cross-examination of declarant:

> Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Ohio v. Roberts, 448 U.S. at 66, (footnote omitted).

The hearsay statement at issue here was never subjected to cross-examination. It was an out-of court confession by co-defendant Phillip Boeglin introduced against respondent Earnest. In admitting this hearsay statement the trial judge

noted that it was strongly self-incriminatory as to Boeglin, and noted the corroborating evidence from Earnest's first trial.

Petitioner State of New Mexico argued on appeal to the New Mexico Supreme Court that Boeglin's statement should be subjected to *Ohio v. Roberts*' indicia-of-reliability test. The New Mexico Supreme Court in the opinion below acknowledged the existence of *Ohio v. Roberts, supra*, and its test for the admission of hearsay statements. But the New Mexico Supreme Court adopted a limitation on the test, restricting its application to only those hearsay statements which had been made at prior judicial proceedings where there was an opportunity for the defendant to cross-examine the declarant. *State v. Earnest,* __N.M.__, 703 P.2d 872, 875-876 (1985); Appendix at 52-54. In so doing, the New Mexico Supreme Court refused to consider the State's argument that the statement at issue fell within a firmly rooted hearsay exception, the statement against penal interest exception recognized by Rule 804(b)(4) of the New Mexico Rules of Evidence, and that the statement bore particularized guarantees of trustworthiness. *State v. Earnest,* Appendix at pp. 53-54; Point III, State's Answer Brief, Appendix at pp. 37-47.

This case therefore presents the issue of whether the indicia-of-reliability test is applicable to uncross-examined hearsay from an unavailable declarant.[3] Petitioner asks this Court to clarify the scope of the holding in *Ohio v. Roberts,* and to hold

[3] It appears undisputed that Boeglin was unavailable to testify. The trial judge declared him unavailable after Boeglin refused to testify in spite of a grant of use immunity and citation for contempt of court. Tape 11, 457-469, 477-513; Tape 12, 578-592, 601-606; Tape 13, 143-145. Respondent Earnest did not argue in the New Mexico Supreme Court that Boeglin was erroneously declared unavailable. Defendant's Brief in Chief, App. at pp. 26-36. The New Mexico Supreme Court held without challenge that Boeglin was unavailable to testify. *State v. Earnest,* App. at p. 52.

that *Roberts'* indicia-of-reliability test is the proper method to be used in determining the admissibility of uncross-examined hearsay. The New Mexico Supreme Court should be reversed, and instructed to apply the indicia-of-reliability test to Phillip Boeglin's hearsay statement.

I

THE INDICIA OF RELIABILITY TEST IS THE BEST MEANS FOR DETERMINING WHETHER UNCROSS-EXAMINED HEARSAY VIOLATES CONFRONTATION RIGHTS.

A central problem with the approach taken by the New Mexico Supreme Court in this case is its inflexibility. It establishes a per se exclusionary rule under the Confrontation Clause applicable to all hearsay where there was no opportunity to cross-examine the declarant. According to the New Mexico Supreme Court's interpretation, confrontation cannot exist without the opportunity for cross-examination. App. at 52-54.

Confrontation should not be equated with cross-examination, or the opportunity to cross-examine. Justice Harlan's concurrence in *California v. Green,* 399 U.S. 149, 172-173 (1970), points out the long-term dangers of equating confrontation with cross-examination. To do so, Justice Harlan reasoned, is to create a constitutional rule of hearsay, which would have a "stultifying effect" upon the development of federal and state evidentiary law. *California v. Green*, 399 U.S. at 173, Harlan, J., concurring. He warned that ". . . it would be most unfortunate for this Court to limit the flexibility of the States and choke experimentation in this evolving area of the law." *California v. Green,* 399 U.S. at 184-185, Harlan, J., concurring.

The approach taken by the New Mexico Supreme Court runs afoul of those concerns. Virtually every existing hearsay ex-

ception is abrogated if the Confrontation Clause rigidly requires an opportunity to cross-examine the declarant. *See, Ohio v. Roberts,* 448 U.S. at 63-64. That approach comes too close to the literal application of the Clause rejected as "unintended and too extreme" in *Ohio v. Roberts. Id.*

Green, and this Court's subsequent decisions under the Confrontation Clause have demonstrated the way to avoid this undesirable result. The Court has not rigidly equated confrontation and cross-examination, as the New Mexico Supreme Court did. Instead, it has taken a more flexible and adaptable approach. It has identified the competing interests implicated in hearsay-confrontation issues, and has sought to accommodate them while preserving the essential values of confrontation. *Ohio v. Roberts,* 448 U.S. at 62-65.

Hearsay-confrontation issues implicate valid, competing interests. The accused has a significant interest in a face-to-face examination of witnesses at trial, with the opportunity to test their evidence through cross-examination and allow the jury to judge their demeanor. On the other hand, considerations of public policy, the necessities of the case and effective law enforcement may justify dispensing with a trial confrontation. *Ohio v. Roberts,* 448 U.S. at 63-64. The Court has emphasized that the proper analytical approach to accommodating those competing interests is one which emphasizes flexibility and adaptability:

> True to the common-law tradition, the process [of accommodating competing interests in hearsay-confrontation cases] has been gradual, building upon past decisions, drawing on new experiences, and responding to changing conditions.

Ohio v. Roberts, 448 U.S. at 64.

Toward that end, *Roberts* adopted the case-by-case inquiry for adequate indicia of reliability as its "general approach to the problem." *Ohio v. Roberts,* 448 U.S. at 65-66.

That inquiry not only provides the flexibility to accommodate the relevant competing interests but also assures that the underlying purposes of the Confrontation Clause are preserved. The mission of the Confrontation Clause "is to advance a practical concern for the accuracy of the truth-determining process in criminal trials by assuring that 'the trier of fact [has] a satisfactory basis for evaluating the truth of the prior statement.'" *Dutton v. Evans,* 400 U.S. 74, at 89 (1970), citing *California v. Green,* 399 U.S. at 161. The trier of fact is afforded a satisfactory basis for evaluating the truth of the prior statement when it bears adequate indicia of reliability. *Ohio v. Roberts,* 448 U.S. at 213. Thus, the presence of indicia of reliability, as described in *Ohio v. Roberts,* satisfies the mission of the Confrontation Clause.

The test used by the New Mexico Supreme Court, the opportunity of cross-examination, cannot adequately address all of the concerns which are addressed by the indicia-of-reliability test. It does not allow for a case-by-case examination of the competing interests. Because of this, the New Mexico Supreme Court's test may actually undermine the accuracy of the truth-finding process in an individual case by excluding clearly reliable evidence.

The New Mexico Supreme Court's approach therefore suffers from the typical problems attendant to per se exclusionary rules in complex evidentiary contexts. This Court has discussed the shortcomings of per se exclusionary rules in the context of suggestive eyewitness identification procedures. It has been noted that such evidence presents problems analogous to hearsay. Westen, The Future of Confrontation, 77 Mich.L.Rev. 1185, 1198-1200 (1979); and *see, California v. Green,* 399 U.S.

at 186, n.20, Harlan, J., concurring. Eyewitness testimony, which may be based upon a suggestive pretrial identification, is highly persuasive evidence, and may be difficult to effectively cross-examine. Westen, The Future of Confrontation, *supra,* and *see, United States v. Wade,* 388 U.S. 218, 235 (1967). In some cases, it is the sole direct evidence of a defendant's guilt. *See, Manson v. Brathwaite,* 432 U.S. 98 (1977). Yet, in that context this Court has rejected the use of inflexible rules of exclusion. *Manson v. Brathwaite,* 432 U.S. at 112-114. Instead, the Court has adhered to a test which examines the totality of the circumstances and admits reliable identifications, even if there was an unnecessarily suggestive pretrial identification. The Court noted that a rule of per se exclusion keeps reliable evidence from the jury, engenders trial error, interferes with the effective administration of justice, and is no more effective in deterring improper identification procedures by police. *Manson v. Brathwaite,* 432 U.S. at 112-114.

By the same logic, this Court should reject the inflexible exclusionary rule adopted by the New Mexico Supreme Court, and should require use of the indicia-of-reliability test to screen uncross-examined hearsay. Use of that test will assure that the underlying purposes of confrontation are satisfied, even though there has been no cross-examination of the declarant. It will provide courts with a familiar framework within which to screen evidence. *See,* Argument, *infra,* at pp. 21-23. The test will provide the flexibility necessary to separate reliable uncross-examined evidence from evidence which would subvert the accuracy of the truth-seeking process. It would provide the best means for accommodating the competing interests identified by *Roberts* in a fair and consistent manner.

It should also be remembered that "evidence with some element of untrustworthiness is customary grist for the jury mill." *Manson v. Brathwaite,* 432 U.S. at 116. That statement,

made in the context of a suggestive eyewitness identification process, has considerable applicability in the present case as well. Once a trial court has found sufficient indicia of reliability in an uncross-examined hearsay statement, the "good sense and judgment of American juries", *id.,* remains as an additional safeguard in measuring evidence which "has some questionable feature." *Id.*

Lastly, it should be noted that *Douglas v. Alabama,* 380 U.S. 415 (1965), does not prevent use of the indicia-of-reliability test in the context of uncross-examined hearsay. In light of this Court's subsequent decisions from *California v. Green* to *Ohio v. Roberts, Douglas* cannot be read as unequivocally preventing the introduction of uncross-examined hearsay, regardless of the reliability of the evidence at issue. The Confrontation Clause "has never been held to bar the admission into evidence of every relevant extra-judicial statement made by a non-testifying declarant simply because it in some way incriminates the defendant." *Parker v. Randolph,* 442 U.S. 62, at 73 (1979).

Instead, *Douglas* is more concerned with prosecutorial misconduct. *See, Dutton v. Evans,* 400 U.S. at 87. In *Douglas,* codefendant Loyd's statement implicating Douglas was read into the record in the guise of leading questions which Loyd refused to answer. The statement was never even introduced into evidence. *Douglas v. Alabama,* 380 U.S. 416-417. Douglas was apparently convicted on the basis of the prosecutor's questions which the jury could have improperly considered as testimony. 380 U.S. at 419. *Douglas* relied significantly upon *Namet v. United States,* 373 U.S. 179 (1963) in reversing the lower court. 380 U.S. at 420. *Namet* was concerned with the evidentiary error resulting from a prosecutor improperly proving his case through witnesses' refusals to answer questions on grounds of their privilege against self-incrimination. 373 U.S. at 187.

This case involves no such considerations. The prosecutor sought a pretrial determination of the admissibility of Boeglin's statement. App. at 6. Boeglin was given use immunity for his testimony. App. at 9. The prosecutor ceased his questioning of Boeglin when it became apparent that he would not testify regarding the statement, and obtained a ruling that Boeglin was unavailable. Tape 12, 578-606. The prosecutor then introduced into evidence the actual tape of Boeglin's statement, which was played for the jury. Tape 14, 280-850; Tape 16, 146-160.

The prosecutor here acted with complete good faith, unlike the prosecutor in *Douglas.* Respondent Earnest was convicted upon evidence rather than inuendo from unanswered questions. Boeglin's statement and its circumstances provided a basis for the jury to assess its reliability, in contrast to the unanswerd questions which convicted Douglas. *See, infra,* pp. 20-30. *Douglas* should not pose an absolute bar to the admission of Boeglin's statement, as the New Mexico Supreme Court assumed.[4]

II

THE INDICIA-OF-RELIABILITY TEST CAN ADEQUATELY DETERMINE WHETHER THE ADMISSION OF THE UNCROSS-EXAMINED STATEMENT AT ISSUE VIOLATES EARNEST'S CONFRONTATION RIGHTS.

The indicia-of-reliability test can adequately address the potential confrontation problems in the statement at issue in

[4] The New Mexico Supreme Court also relied upon *United States v. Rothbart,* 653 F.2d 462 (10th Cir. 1981) as its authority for limiting *Ohio v. Roberts* test solely to situations involving prior testimony. App. at p. 54. *Rothbart* does not address that issue, expressly confining itself to the question of whether the declarant was shown to be unavailable. 653 F.2d at 466.

this case. Boeglin's statement includes many of the reliability factors applicable to the hearsay exception for statements against penal interest. In addition, the statement's details are corroborated by considerable independent evidence. Examination and assessment of these factors will provide a solid, reliable basis upon which to weigh the competing interests at stake and determine whether admission of the statement will contravene the essential interests protected by the Confrontation Clause.

The first area of inquiry would focus on the presence of those reliability factors which have lead to the recognition of a common hearsay exception. *Ohio v. Roberts,* 448 U.S. at 66. This is because the hearsay exceptions have developed to allow admission of statements made under circumstances that tend to assure reliability and thereby compensate for the absence of an opportunity for cross-examination. *Chambers v. Mississippi,* 410 U.S. 284, 298-299 (1973). In fact, some hearsay exceptions address reliability sufficiently that "admission of virtually any evidence within them comports with the 'substance of the constitutional protection.'", *Ohio v. Roberts,* 448 U.S. at 66, quoting *Mattox v. United States,* 156 U.S. at 244.

The hearsay exception for statements against interest is among the most prevalent exceptions. *Chambers v. Mississippi,* 410 U.S. at 299. Reliability is properly inferred because "people do not lightly admit a crime and place critical evidence in the hands of the police in the form of their own admissions." *United States v. Harris,* 403 U.S. 573, 583 (1971). In *Dutton v. Evans,* 400 U.S. at 88-89, the self-incriminatory nature of the statement was one of the indicia of reliability relied upon by the Court in finding that its admission was not a violation of Evans' confrontation rights. In *United States v. Harris,* 403 U.S. at 573, a statement against penal interest was considered

reliable enough to support a finding of probable cause to search. In *Chambers v. Mississippi,* 410 U.S. at 302, a statement against penal interest was found to have such "persuasive assurances of trustworthiness" that the state's hearsay rules could not be used to exclude it, when it was deemed critical to the defense.

Petitioner does not suggest that all statements against penal interest will automatically satisfy the indicia-of-reliability test. "Concededly, admissions of crime do not always lend credibility to contemporaneous or later accusations of others." *United States v. Harris,* 403 U.S. at 584. The declarant may have been motivated by the desire to obtain a favorable plea bargain, or other such factors which would undercut the reliability of the statement. *See, Parker v. Randolph,* 442 U.S. 62 (1979) at 86, n.6, Stevens, J., dissenting; *State v. Parris, infra,* 654 P.2d 77 (Wash. 1982). However, this Court has noted considerable criticism for statements from its earlier cases implying that statements against penal interest are "without value" and "per se inadmissible". *United States v. Harris,* 403 U.S. at 584. The adoption of Rule 804(b)(3) of the Federal Rules of Evidence further supports the view that such statements may be trustworthy and reliable under proper circumstances. *See, United States v. Harris,* 403 U.S. at 584.

Courts will not find great difficulty in applying the indicia-of-reliability test to statements against penal interest by unavailable declarants and separating the reliable from the unreliable. Indeed, some have already done so. *See, e.g., United States v. Katsougrakis, infra,* 715 F.2d 769; *United States v. Layton,* 720 F.2d 548 (9th Cir.), *cert. den.*, 104 S.Ct. 1423 (1984); *State v. Parris,* 98 Wash. 2d 140, 654 P.2d 77 (Wash. 1982); *People v. Moore,* 693 P.2d 388 (Colo.App. 1984). In doing so, these courts have been guided by the substantial body of case law discussing particular factors commonly deemed to demonstrate the trustworthiness, or lack thereof, in particular statements against penal interest by unavailable declarants.

See, e.g., United States v. Layton, supra, (applies factors discussed in *Dutton v. Evans,* 400 U.S. 74, *supra*); *State v. Barber,* 689 P.2d 1099 (Wash.App. 1984), (applies factors from *Dutton* and *United States v. Alvarez,* 584 F.2d 694 (5th Cir. 1978). The indicia-of-reliability test has been used to exclude such statements when found not to be sufficiently reliable to meet the interests of the Confrontation Clause. *See, State v. Hoak,* 107 Idaho 742, 692 P.2d 1174 (Idaho 1984).[5]

The traditional accouterments of the hearsay exception for statements against penal interest provide a viable and time-tested method for assessing reliability. But in addition, a court may also undertake a particularized inquiry for appropriate guarantees of trustworthiness, as described by the *Roberts* indicia-of-reliability test. Though *Roberts* authorizes the admission of some hearsay solely because it falls within a firmly rooted hearsay exception, most courts have augmented the reliability inquiry by undertaking in addition to examine the particularized indicia of reliability in statements against penal interest. *See, e.g., United States v. Katsougrakis,* 715 F.2d 769 (2nd Cir.), *cert. denied,* 104 S.Ct. 704 (1984); *State v. Barber,* 38 Wash.App. 758, 689 P.2d 1099 (Wash.App. 1984); Weinstein's Evidence, § 804(b)(3)[03], 804-153, n.43. Peti-

[5] These considerations should also serve to distinguish this case from *Bruton v. United States,* 391 U.S. 123 (1968). The *Bruton* opinion takes care to emphasize that the statement there was inadmissible under traditional evidentiary rules and fits no recognized hearsay exception. 391. U.S. at 128, n.3. Since *Bruton,* the Federal Rules of Evidence have been enacted, recognizing the penal interest exception in Rule 804(b)(3), and many states have followed suit. *See,* Weinstein's Evidence, § 804(b)(3), [03], [04], and [05]. As noted above, there is now a substantial body of case law which interprets the penal interest exception and provides guidance on applying it to individual situations. Courts now have a basis for admitting such statements, and cognizable rules and precedents upon which to decide admissibility, unlike the situation at the time of *Bruton.*

tioner supports a rule which would require an examination of the corroborating evidence and other guarantees of trustworthiness when a statement against penal interest made in a custodial setting by an unavailable declarant is offered against an accused. The hearsay statement of Boeglin, together with its surrounding circumstances and supporting evidence will provide a basis for adequately assessing its particularized guarantees of trustworthiness.

This Court should remand this case to the New Mexico Supreme Court with instructions to apply the indicia of reliability test to Phillip Boeglin's statement. If the test is applied, there are many factors in this case which indicate that the statement affords the trier of fact an adequate basis for assessing its reliability.

First, many of the factors traditionally supporting the reliability of statements against penal interest are present.

The hearsay statement includes Boeglin's confession to active participation in premeditated murder, kidnapping and conspiracy to commit each of those offenses. *See,* State's Exhibit 39, App. at 10-22.[6] It describes how Boeglin, Conner and respondent Earnest voted on whether to kill Eastman, the victim, because they feared that he would inform on them regarding the fourteen grams of methamphetamine Eastman purchased from Conner earlier the same day. *Id.* Boeglin's statement described how he and his companions first attempted unsuccessfully to give Eastman a fatal drug overdose, then

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[6] The actual tape of Boeglin's statement, State's Exhibit 39A, is not a part of the record in this case, because it was used in the subsequent trial of Phillip Boeglin, and is now part of the record in *State v. Boeglin,* N.M. S.Ct. No. 15,746, Boeglin's New Mexico Supreme Court appeal of his conviction for murder, conspiracy and kidnapping. That case has been argued and awaits decision.

shot him and cut his throat, leaving his body next to a rural highway. State's Exhibit 39, App. at 16-17. Boeglin stated that he cut Eastman's throat, and that respondent Earnest shot Eastman in the head. State's Exhibit 39, App. at 17.

The chief indicator of reliability for such statements is their tendency to subject the declarant to criminal sanctions. *See, United States v. Harris,* 403 U.S. at 583. In that regard, it has been observed that "no other statement is so much against interest as a confession of murder, it is far more calculated to convince than dying declarations, which would be let in to hang a man." *Donnelly v. United States,* 228 U.S. 243, 278 (1913), Holmes, J., dissenting. Boeglin's statement is a confession to murder during a kidnapping and for the purpose of silencing a potential witness, two matters which render Boeglin eligible for the death penalty in New Mexico. *See,* 31-20A-5(B) and (G), N.M.S.A., 1978 Comp. Those portions of Boeglin's confession which detail respondent Earnest's criminal activity are in the context of their joint purpose of kidnapping and murdering Eastman. State's Exhibit 39, App. at 15-17. Thus, they incriminate Boeglin also as to the separate crime of conspiracy. *See,* 30-28-2, N.M.S.A., 1978 Comp. Because of this, the same portions of the statement which incriminate respondent Earnest are simultaneously statements against Boeglin's penal interest. *United States v. Layton,* 720 F.2d at 560. They possess the same reliability as the portions which tend to implicate Boeglin as a principal in the murder. It is also significant that Boeglin's statement was given to a deputy sheriff and the chief investigator for the local district attorney's office, who had told Boeglin explicitly that anything he said could and would be used against him. *See,* State's Exhibit 39, App. at 11. It is this awareness by the declarant that his statements are damaging to him which tends to lend significance to them. *See, State v. Parris,* 654 P.2d at 82.

There is also evidence indicating that Boeglin was aware that he could not expect to gain any advantage by implicating himself, Conner and Earnest. Boeglin first attempted to bargain for his freedom before confessing, but was consistently rebuffed by Investigator DeLuche who refused to offer any deals. State's Exhibit 39, App. at 11-14. DeLuche stated only that he would tell the prosecutor what information Boeglin supplied, and refused to make any representations as to what action the prosecutor would take. *Id.* DeLuche even pointed out that it would be "stupid" to make a deal with Boeglin, because it might turn out that Boeglin was the one who cut Eastman's throat. State's Exhibit 39, App. at 13. Boeglin, a few minutes later, confessed to cutting Eastman's throat. State's Exhibit 39, App. at 17. Boeglin knew he would not be offered any advantage by confessing, and admitted his personal responsibility for the act which the police considered the most serious and culpable. He had nothing to gain and made no attempt to shift the blame. *See, United States v. Robinson,* 635 F.2d 363 (5th Cir.) *cert. denied,* 452 U.S. 916 (1981). DeLuche also indicated that he would subject Boeglin's story to a lie detector test. State's Exhibit 39, App. at 14.

Turning to the second part of the indicia-of-reliability test, petitioner will also be able to show on remand that there is considerable evidence which corroborates Boeglin's statement and indicates its trustworthiness.

Boeglin gave his statement at 3:13 p.m. on February 12, 1982. Tape 13, 9/83, 236-243; 501-512. Eastman was murdered at approximately 3:15 a.m. on the same day. Tape 9, 9/83, 685-741; Tape 10, 50-56. It is unlikely that his memory of the event would have faded. *See, People v. Moore,* 693 P.2d 388, *supra* (statement given three days after crime). The statement was tape-recorded, and the jury heard the actual

tape. Tape 14, 9/83, 280-850. Thus, the jury was in a particularly good position to judge Boeglin's state of mind at the time of the statement. *United States v. Layton,* 720 F.2d at 562-563.

There was also considerable factual corroboration for Boeglin's statement. Eastman's roommate, Michael Blount, testified as to the drug deal involving Boeglin, Conner, Eastman and respondent Earnest on February 11. Tape 10, 9/83, 554-653. Eastman left and never returned home that night. Tape 10, 766-783. Blount further testified to seeing Boeglin, Conner and Earnest in Eastman's car about 6:20 a.m. on the following morning. Tape 10, 810-831. Michael Blount and his fellow workers then came upon Eastman's body laying by the side of the road being examined by police. Tape 10, 843-889.

Dana Boeglin, Phillip Boeglin's wife, testified that she and Conner's girlfriend went to Conner's house on the night of February 11. Tape 16, 204-243.[7] Phillip Boeglin and Earnest were there, along with a man unknown to Mrs. Boeglin. Tape 16, 231-243. Earnest had a gun in his hand and was sitting across from the unidentified man. Tape 16, 263-287. Earnest commented that they thought the man was a "narc." Tape 16, 325-343. Conner returned, stated that the man was a "narc" and that they were going to kill him. Tape 16, 343-369. Conner stated that they would either overdose him on drugs or cut his throat and "blow him away." Tape 16, 408-416. Mrs. Boeglin and Conner's girlfriend left and spent the night at the Boeglin home. Tape 16, 243-252. Early the next morning, Mrs. Boeglin saw Conner, Phillip Boeglin and Earnest. Conner

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[7] Dana Boeglin was a reluctant witness for the prosecution. The prosecutor sometimes used leading questions and excerpts from her prior testimony to draw out her answers. Tape 16, 325-343, 408-410, 499-505, 561-569.

instructed his girlfriend that, if the police came by, she was to say that he, Earnest and Phillip Boeglin had played cards all night. Tape 16, 525-569.

Boeglin's statement described an attempt to fatally overdose Eastman on four grams of "crystal," apparently with some assistance from Eastman. When that failed, Boeglin, Conner and Earnest took Eastman to a rural area, shot him in the head, and cut his throat. State's Exhibit 39, App. at 16-17. A toxicologist testified that Eastman's blood contained enough methamphetamine to kill a person, unless that person had a high tolerance for the drug. Tape 19, 119-154. The pathologist testified that Eastman had gunshot wounds to the head, and cuts across his throat. Tape 19, 332-347. Phillip Boeglin's statement recited that he had twice cut Eastman's throat, but that the knife did not seem to cut well. State's Exhibit 39, App. at 17. The pathologist stated that Eastman has two cuts across his throat, but that they had not gone deep enough to sever the major arteries. Tape 19, 347-353, 406-418; *see also,* photographic Exhibits 12 and 13. Many other details of Boeglin's statement were also well corroborated. Boeglin's statement reflects that they beat Eastman several times during the night, prior to killing him. State's Exhibit 39, App. at 16-17. The pathologist testified that Eastman had bruises on his face, arms and legs, made prior to death. Tape 19, 353-357. Boeglin described how the gun used to shoot Eastman jammed several times, necessitating reloading at one point. State's Exhibit 39, App. at 17. A firearms expert testified that the gun used to kill Eastman malfunctioned more than any similar weapon he had ever seen. Tape 18, 61-77. Several live, unfired rounds of ammunition were found next to Eastman's body. Tape 8, 694-749. The rounds had marks which were consistent with having been worked through the action of the gun used to shoot Eastman. Tape 18, 23-61. Boeglin's statement reflects that it was dark, but near dawn when Eastman was murdered. State's

Exhibit 39, App. at 19. A medical investigator testified that she examined Eastman's body at 7:15 a.m., and that he had been killed within the previous four hours. Tape 9, 684-705; Tape 10, 50-56. Boeglin's statement reflects that Eastman was murdered next to the Loving Highway. State's Exhibit 39, App. at 17. Eastman's body was found next to the road between Loving and Otis, New Mexico. Tape 7, 175-199. Boeglin's statement described a place near the Black River where the gun was hidden. State's Exhibit 39, App. at 18. The gun was recovered near the Black River, with Boeglin's help. Tape 9, 57-178.

The evidence arguably supports a finding that Boeglin's statement so tended to subject him to criminal liability that no reasonable person would have made it unless he believed it to be true. *See,* Rule 804(b)(4), New Mexico Rules of Evidence. Also, because of proximity in time between the crime and the statement, plus the evidence corroborating its details, there is a basis for finding that he accurately perceived and remembered what was related and that the statement accurately conveyed his intended meaning. This coincides with the essential issues normally addressed through cross-examination. *See, Ohio v. Roberts,* 448 U.S. at 71 (principal purpose of cross-examination).

These matters could well support a finding upon remand that Boeglin's statement possessed adequate indicia of reliability to assure its reliability and to allow the jury a satisfactory basis for so concluding. The statement, its surrounding circumstances, and the evidence in corroboration should be subjected to that test.

CONCLUSION

The opinion of the New Mexico Supreme Court should be reversed, insofar as it held that *Ohio v. Roberts* indicia-of-reliability test could not be applied to Phillip Boeglin's statement. This case should be remanded to the New Mexico Supreme Court, with instructions to apply the indicia-of-reliability test to Boeglin's statement and determine whether it is admissible against respondent Earnest under the standards of that test.

Respectfully submitted,

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RESPONDENT'S

BRIEF

Supreme Court, U.S.
FILED
JAN 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-162

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF NEW MEXICO,

Petitioner,

v.

RALPH RODNEY EARNEST,

Respondent.

On Writ Of Certiorari To The Supreme Court Of New Mexico

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Sixth Amendment requires exclusion of a co-defendant's jointly inculpatory statement from the accused's trial where the statement is offered as substantive evidence and the declarant is not available for cross-examination?

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STATEMENT OF THE CASE

Petitioner's recitation of the facts is generally correct. However, in numerous instances Petitioner indicates that the named co-defendants in this case, Earnest, Boeglin and Conner, acted together. An example appears at pages 4-5 of Petitioner's brief where counsel states: "Conner, Earnest and Boeglin took a vote at one point on killing Eastman but later changed their minds and decided to let him go." Petitioner cites to Boeglin's transcribed statement which is included in the Joint Appendix in support of this statement of fact. Reference to the statement, however, shows that Boeglin never identified Conner and Earnest in saying: "we more or less took a vote, you know, what we was going to do with him to get rid of him—then we changed our minds and uh—decided, you know, to let him go. . . ." (J.A. 16). In fact, there is not one reference in the statement to Boeglin's co-defendants as "Conner" and "Earnest," yet Petitioner's statement of the case is replete with these references.

The problem with this factual rendition is two-fold: first, Boeglin's statement was the only evidence directly implicating himself or others in the commission of the offense admitted at trial; and second, there is no evidence within the statement or extraneous to it where Boeglin identifies Respondent Earnest as the person he referred to in the statement when he refers to "Rob." Contrary to Petitioner's contention in footnote 2, it is not "clear" that Earnest is the person Boeglin implicated in the statement, even though Earnest admitted at trial that he was present on the night before the killing and was arrested with Conner and Boeglin the morning after the killing took place.

Further, while references to "Conner, Earnest and Boeglin" are numerous in the Petitioner's brief, Boeglin's statement includes only four references to an individual named "Rod—or Rob, whatever his name is." (J.A. 15). "Rob" and Boeglin apparently went to Red's (Connor's) house on the 11th, the day before the statement was given. (J.A. 15). "Rob" and Red and Boeglin took him (Eastman, the victim) out into the country. (J.A. 17). All four men were sitting in the front seat of the El Camino pickup truck, with Red driving—"Rob" was there. (J.A. 17). Finally, Boeglin relates that "Rob" shot Eastman first

as Boeglin was falling out of the vehicle. (J.A. 17). These were the only references to "Rob" in the statement and form virtually the entire case against Earnest.

Petitioner also draws an inference from Boeglin's statement which is not supported by the statement with respect to the reason for Boeglin attempting to cut Eastman's throat. Petitioner states: "Boeglin then attempted to cut Eastman's throat, because he appeared to still be alive." (Petitioner's brief, at 5). In the statement, Boeglin never said he tried to cut Eastman's throat because he was still alive; in fact, he gives no reason at all for this act. (J.A. 17). Contrary to the Petitioner's assertion that "Conner and Earnest hid the gun under a rock," Boeglin's statement gives no such information. (J.A. 18). The gun may have been hidden under a rock, but Boeglin did not say that Conner and Earnest hid it there.

Because the reliability of Boeglin's statement is central to the Petitioner's theory of the case in this Court, Respondent believes Petitioner's liberal substitution of "Earnest" for "Rob" in relating the facts of the case portrays the evidence as far stronger than it actually is. The only direct evidence concerning the murder is Boeglin's confession; that statement should be viewed scrupulously since the issue before this Court is whether it should have been admitted at trial once Boeglin refused to testify.

NOTE REGARDING CITATIONS

As Petitioner notes in its brief, trials are recorded on audio cassette in New Mexico. Because the Attorney General's office uses different equipment than the Public Defender Department and private counsel, tape citations often differ because of equipment differences. The tape references included in this brief are based on counter numbers taken from a Sony BM 12 machine which counts to 725 per side of cassette tape. Thus, all citations appear (Tape 1/1-100), designating the number of the tape and the appropriate counter number marking the place within the tape where the testimony can be heard. Additionally, in this case, Respondent notes that one of the trial tapes, number 17, was wholly unaudible when filed with the

record on appeal. This tape included trial testimony of Dana Boeglin, wife of the declarant. Because the master was determined to be blank, this testimony is no longer available.

SUMMARY OF ARGUMENT

The focus of Petitioner's argument is that the New Mexico Supreme Court erred in holding that *Ohio* v. *Roberts* 448 U.S. 56 (1980) was inapplicable in Respondent's case to permit use of a confession allegedly given by a co-defendant to police where the co-defendant exercised his Fifth Amendment privilege at trial and refused to testify, thereby depriving Respondent of any cross-examination of the co-defendant. Petitioner's theory is that New Mexico has misconstrued federal constitutional principles to exclude all hearsay that cannot be subjected to cross-examination at trial. Further, Petitioner advances the theory that the requisites of the Confrontation Clause are satisfied if the statement is sufficiently reliable, even where cross-examination is unavailable. Petitioner argues:

> The trier of fact is afforded a satisfactory basis for evaluating the truth of the prior statement when it bears adequate indicia of reliability. *Ohio* v. *Roberts*, 448 U.S. at 213. Thus, the presence of indicia of reliability, as described in *Ohio* v. *Roberts*, *satisfies the mission of the Confrontation Clause*. (Emphasis added)

(Petitioner's brief, at 17).

Respondent argues that New Mexico has mischaracterized the holding of the New Mexico Supreme Court in an effort to avert the central problem inherent in its position—that its approach would virtually emasculate the right to cross-examine adverse witnesses at trial. The holding below hardly suggests the conclusion drawn by Petitioner that New Mexico will no longer permit introduction of any out-of-court statement without the opportunity for cross-examination before the trier of fact. Although the state court could conceivably author such an approach in its interpretation of state evidence law and state constitutional provisions, the evidence shows conclusively otherwise. The New Mexico Supreme Court has adopted rules of evidence which reflect the federal rules in all significant

respects, including recognition of numerous exceptions to the hearsay rule where the availability of the declarant is deemed immaterial, *See* N.M.R.Evid 803; and five well-defined exceptions where the declarant can be termed "unavailable" for purposes of giving live testimony at trial. Moreover, the rules provide for additional exceptions where proper indicia of reliability are present. Perhaps more significantly, the New Mexico Supreme Court and Court of Appeals have consistently held that these exceptions are recognized and accepted under state law in decisions rendered by those courts. *See State* v. *Owens* ___ N.M. ___, 703 P.2d 898 (Ct. App. 1984).

Consequently, to suggest that the holding below threatens reliance on all recognized exceptions to the hearsay rule under the authority of *Ohio* v. *Roberts* is simply misleading. Rather, the opinion below answers the precise question posed in the briefs by the parties before the court, whether the admission of a non-testifying co-defendant can be admitted without affording the accused a right to cross-examine consistent with the requirements of the Confrontation Clause of the Sixth Amendment. In that court, the defense relied on this Court's decision in *Douglas* v. *Alabama* 380 U.S. 415 (1965) and the State argued the applicability of *Ohio* v. *Roberts*. (Compare briefs of the parties, J.A. 26-36; 37-47). Thus, the New Mexico Supreme Court's discussion of the latter decision really reflects its rejection of the State's position as applied to the matter squarely before the court on direct appeal—admission of a non-testifying co-defendant's statement where no opportunity for cross-examination has been afforded the accused. Petitioner's assertion that the *Earnest* opinion rests on the conclusion of the New Mexico Supreme Court that "confrontation cannot exist without the opportunity for cross-examination" is a generalization that is both inappropriate in the context of New Mexico law and in light of the narrower focus of the court in the *Earnest* opinion.

The thrust of Petitioner's position is that the "indicia of reliability" test is appropriate even when the hearsay elicited is the custodial statement of a co-defendant who refuses to testify at trial and has not been previously cross-examined at any

point in the proceedings. Petitioner then argues that the statement here bears those indicia of reliability which would justify admission, even though Petitioner moves this Court remand the cause for a determination of the merits of this position by the state supreme court. The state is incorrect with regard to both points.

This case actually raises the issue of whether the Court will now reverse *Douglas* v. *Alabama* and a series of cases dealing with inculpatory statements allegedly made by non-testifying or unavailable "witnesses" and reinstate the practice of trial by affidavit. The New Mexico Supreme Court rejected this practice in reversing Respondent's conviction. *State* v. *Earnest*, ___ N.M. ___, 703 P.2d 872 (1985).

ARGUMENT

I.

THE NEW MEXICO SUPREME COURT CORRECTLY HELD THAT THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT BARS ADMISSION OF A NON-TESTIFYING CO-DEFENDANT'S CUSTODIAL STATEMENT AS SUBSTANTIVE EVIDENCE AGAINST THE ACCUSED WHERE NO OPPORTUNITY FOR MEANINGFUL CROSS-EXAMINATION IS AFFORDED.

The critical question posed by the *Earnest* case is whether the Court should reverse or modify prior decisions, including *Douglas* v. *Alabama*, which have traditionally rested on the judgment that the Confrontation Clause requires that a criminal defendant be afforded an opportunity to cross-examine an accomplice accuser who has given an inculpatory statement to the police while in custody. Admission of these types of statements have been regulated with closer scrutiny with regard to the requirements of the Confrontation Clause than other forms of hearsay or out-of-court statements. In *Bruton* v. *United States*, 391 U.S. 123, 136 (1968), for example, the Court concluded that a limiting instruction to the jury could not protect an accused from the prejudicial impact of a confession made by a non-testifying co-defendant where the statement inculpated

both parties in a joint trial and the declarant "does not testify and cannot be tested by cross-examination."

Respondent argues that regardless of the extent to which confrontation may be deemed sufficient without cross-examination with regard to other hearsay statements, cross-examination remains constitutionally mandated by the Sixth Amendment where the statement offered has been made by an accomplice while in custody and the accomplice is unavailable for testimony at trial through no fault of the accused. *See Reynolds* v. *United States*, 98 U.S. 145, 158-161 (1879) (defendant cannot profit by his activity in procuring absence of declarant at trial).

The essence of the right guaranteed by the Confrontation Clause is the testing of adverse evidence and testimony through complete opportunity to question and examine the declarant before the trier of fact at the criminal trial. In this sense, this Court has concluded that "confrontation" requires more than a mere confronting of the accused with adverse witnesses physically. *Davis* v. *Alaska*, 415 U.S. 308, 315 (1974). The right of cross-examination permits the accused through counsel to "expose to the jurors the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness." *Id.*, at 318. Similarly, the Court in *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968), recognized that restrictions or limitations on the scope of permissible cross-examination raise Confrontation Clause issues because they may tend to "emasculate the right of cross-examination."

Recently, in *Delaware* v. *Fensterer*, ___ U.S. ___, 106 S.Ct. 292, 294 (1985), this Court again recognized that Confrontation Clause cases generally involve two categories of cases: those involving admission of out-of-court statements and those involving limitations on the scope of cross-examination. Clearly, the issue raised by *Earnest* runs to the core of the protections afforded by the Clause since Respondent was denied any opportunity to cross-examine co-defendant Boeglin about the confession he apparently gave to police while in custody and this confession was admitted as substantive evi-

dence against him at trial. *Tennessee* v. *Street*, ___ U.S. ___, 105 S.Ct. 2078, 2081 (1985). Respondent's complaiant in the New Mexico Supreme Court was not that he was limited in the scope of cross-examination, but that he was wholly deprived of any opportunity to test Boeglin's perceptions and memory or to impeach or discredit Boeglin. *Davis*, 415 U.S. at 316.

Petitioner's argument is predicated on its conclusion that *Ohio* v. *Roberts* expressed this Court's position that the "mission of the Confrontation Clause" is satisfied by "the presence of indicia of reliability" which may be attributed to the statement. (Petitioner's brief, at 17). Petitioner apparently contends that cross-examination can simply be dispensed with in any case in which a statement made by an unavailable or non-testifying witness can be deemed reliable by the trial court through application of the elements of any recognized exception to the hearsay rule. Historically, however, the "mission" or underlying purpose of the Clause has been discerned to be the end to the practice of trial by *ex parte* affidavit or deposition secured by a magistrate without benefit of cross-examination of the declarant before the jury at trial.

A thorough historical analysis of the Clause and the apparent intent of the *Framers* in its inclusion in the Sixth Amendment is presented by the Solicitor General in his brief in *United States* v. *Inadi*, No. 84-1580, argued before the Court this term. The United States has argued persuasively in *Inadi* that the source of the principal protection of the Clause was concern that the practice of trial by affidavit be ended. (*See* Brief for the United States, *United States* v. *Inadi*, No. 84-1580, at 12-24). In concluding its historical analysis, the Government observed:

> A third party's confession, which *may* fall within the modern exception for declarations against penal interest (Fed. R. Evid. 804(b)(3)), is another example of hearsay that may properly be subject to close regulation under the Confrontation Clause. Confessions may have all the breadth and detail of an affidavit or deposition. *And like the affidavits and depositions obtained by examining magistrates in the 17th century, confessions are generally obtained ex parte, in contemplation of litigation, and with*

> *the participation of prosecutorial authorities*. [emphasis added].

(*Id.*, at 24). The statement admitted at Respondent's trial bears those characteristics of *ex parte* affidavits and depositions noted by the Solicitor since it was obtained *ex parte*, clearly in contemplation of prosecution and with the participation of prosecution authorities. It was obtained before Boeglin had been afforded access to counsel[1] and was neither given before a neutral and detached magistrate nor under oath.

The posture taken by the Solicitor in *Inadi* with respect to the historical basis of the Confrontation Clause guarantee comports in many significant respects with Justice Harlan's concurrence in *California* v. *Green*, 339 U.S. 149, 172 (1970), on which Petitioner here places great reliance. (Petitioner's brief, at 15). It is from a footnote to that concurring opinion, for instance, that Petitioner apparently draws the source of its

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[1] Boeglin's custodial statements were the subject of independent litigation in the New Mexico courts. *State* v. *Boeglin*, 100 N.M. 127, 666 P.2d 1274 (Ct. App. 1983). After remand, the court reversed the trial court's determination that his third staement given on the day of his arrest, February 12, 1982, was improperly taken based on his apparent lack of understanding of his right to assistance and advice of counsel prior to discussing the case with the police. The state supreme court reversed the court of appeals in an unpublished opinion, apparently finding an implied waiver of counsel because Boeglin initiated the contact with authorities resulting in his 3:13 p.m. statement. At trial, Boeglin's first attorney testified that he first saw Boeglin after 5 p.m. that day. (Tape 20/225-460). New Mexico law requires police to inform an accused not represented by counsel that counsel will be provided if he cannot afford to retain an attorney. N.M. Stat. Ann. § 31-15-12 (1978). The court of appeals concluded: "The record does not reflect that any effort was made to provide [Boeglin] with a court-appointed lawyer until arraignment." 666 P.2d at 1276. Boeglin's confused expression regarding his understanding of this right appears in his 3:13 statement. (J.A. at 11). Under New Mexico law an accused may waive representation at any stage of the proceedings after being advised of his right to counsel. *State* v. *Rascon*, 89 N.M. 254, 550 P.2d 266 (1976). The state supreme court apparently concluded from the record that Boeglin waived the right.

argument that *Douglas* v. *Alabama* is a case "more concerned with prosecutorial misconduct" than violation of confrontation. (Petitioner's brief, at 19; *also* at 10-11). Interestingly, however, Justice Harlan noted:

> The result in *Douglas* v. *Alabama*, to which I still adhere, can be rationalized under this test since there the inadmissible confession "constituted the only direct evidence" that petitioner had committed the murder.

399 U.S. at 186, n. 20. Only then did Justice Harlan note that an additional factor supporting the decision was the misconduct of the prosecutor in enhancing the claim of reliability of the untested confession by reading it to the jury as the declarant claimed the privilege and refused to repudiate its contents. Prosecutorial misconduct is also mentioned in *Dutton* v. *Evans*, 400 U.S. 74, 87 (1970) as an underlying factor in the *Douglas* decision, as Petitioner states, but this was not the basis for the decision rendered in *Douglas*, nor does it appear to be Justice Harlan's primary concern in affirming his support for the holding there. Perhaps a more reliable expression of Justice Harlan's views is found earlier in footnote 20:

> By the same token I would not permit a conviction to stand where the critical issues at trial were supported only by ex parte testimony not subject to cross-examination, and not found reliable by the trial judge.

399 U.S. at 186, n.20.

While Petitioner appears to be correct in concluding that Justice Harlan cautioned against equating confrontation with cross-examination, his concurrence in *California* v. *Green* hardly suggests that he minimized the constitutional significance of cross-examination, deeming it instead an element of due process. *Id.* What is clear from his opinion, however, is his concurrence in the assessment that the Confrontation Clause was intended to end the practice of trial by affidavit:

> That, historically, the primary concern was the possibility of trial by affidavit may be evidenced by several early state constitutional provisions that specifically made exceptions to confrontation by providing for use of depositions when the witness is unavailable.

399 U.S. at 180, n.15. In so concluding, Justice Harlan pointed to a provision of the California constitution expressly permitting use of deposition testimony taken "in the presence of the party accused and his counsel" when there was reason to believe the witness would be unavailable for trial.

In contrast to Justice Harlan's view of cross-examination as a constitutional element of due process, rather than confrontation, the majority opinion in *California* v. *Green* rests on application of confrontation principles to the question of whether testimony adduced at a preliminary hearing could properly be introduced at trial where the same witness claimed lack of memory which affected the substance of his testimony. The majority, through Justice White, found that the accused's right to confront a key fact witness at trial was satisfied by his earlier opportunity to vigorously cross-examine the witness through counsel at the preliminary hearing. The majority rejected the argument that confrontation required both cross-examination at the time the declaration inculpating the accused was initially made, as well as the time of trial, holding:

> . . . inability to cross-examine the witness at the time he made his prior statement cannot easily be shown to be crucial significance as long as the defendant is assured of full and effective cross-examination at the time of trial.

399 U.S. at 159. The witness had been available to testify at the preliminary hearing where he was effectively cross-examined under oath by counsel in the context of a judicial proceeding on the record. At trial, he was again subject to cross-examination regarding his recollection of the circumstances of the offense, as well as to his refreshed recollection of his preliminary hearing testimony. *Id.*, at 151-152.

In contrast to the situation presented in Respondent's case, the accused in *California* v. *Green* essentially benefitted from two distinct opportunities to cross-examine the state's key fact witness. At the preliminary hearing Green's counsel had the opportunity to question witness Porter about his initial statement to police identifying Green as the supplier of the marihuana found in the witness's possession. This cross-examination produced variation between the officer's testi-

mony of the substance of Porter's initial statement and Porter's testimony concerning Green's involvement in the transaction given at the hearing. After the prosecution used the preliminary hearing testimony to "refresh" Porter's recollection of his prior statement at trial, Green's counsel was then afforded an additional opportunity to develop the unreliability of the witness by comparing discrepancies in his testimony and pointing to his claimed altered mental state—allegedly induced by ingestion of LSD prior to the actual transaction—in an effort to discredit the witness. In a very real sense, *California* v. *Green* demonstrates the value of cross-examination as a tool in testing the reliability of a witness during the course of proceedings culminating in a criminal trial.

Respondent Earnest, of course, enjoyed neither the opportunity to cross-examine Boeglin at the preliminary hearing, nor at the time of trial. Nor was his counsel present to test the accuracy of Boeglin's assertions when his statement was taken by police after he was taken into custody, although there is certainly nothing unusual about this aspect of the case. Instead, Boeglin's confession was offered as the only direct evidence of Earnest's participation in the capital murder without any testing of either the reliability of Boeglin as a witness or the truth of the matters asserted in the statement.

The majority opinion in *California* v. *Green* accepted the value of confrontation in testing the truthfulness of an out-of-court declaration "as long as the declarant is testifying as a witness and subject to full and effective cross-examination." 399 U.S. at 158. In such a circumstance, the Court concluded:

> Confrontation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

Id.

This expression in *California* v. *Green* reflects the same appreciation for the value of cross-examination that the Court had much earlier noted in *Mattox* v. *United States*, 156 U.S. 237, 242-243 (1894):

> The primary objective of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they might look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

The *Mattox* Court ultimately held, just as the Court in *Green*, that admission of testimony given at a prior proceeding in which the accused had an opportunity to test the evidence through cross-examination of the witness afforded an exception to the general rule preferring cross-examination at trial where the witness subsequently became unavailable. *Id.*, at 243. Nevertheless, both decisions are factually distinguishable from Respondent's case precisely because there had been an adequate opportunity for cross-examination during the course of the proceedings culminating in trial on the merits.

That New Mexico law also recognizes the value of cross-examination is evident in the two selected Uniform Jury Instructions given at trial which are included in the record. (J.A. 23). Jury Instruction No. 12 advised the jurors, in pertinent part:

> You are the sole judges of the facts in this case. It is your duty to determine the facts from the evidence produced here in Court. Your verdict should not be based on speculation, guess or conjecture.

Jury Instruction No. 13 then directed the jurors:

> You alone are the judges of the credibility of the witnesses and the weight to be given to the testimony of each of them. In determining the credit to be given any witness, you should take into account his truthfullness or untruthfulness, his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have and the reasonableness of his testimony considered in the light of all the evidence in the case,

Respondent Earnest was, of course, denied the proper exercise of discretion by the jury in evaluating the demeanor and potential interest or bias of witness Boeglin and in gauging the reliability of the information given in his statement made in custody by the absence of cross-examination of Boeglin at trial. The promise of a fair jury trial implied in the foregoing jury instructions was effectively rendered meaningless where the credibility of the key state's witness at trial could not be tested through live testimony and cross-examination.

In arguing that a *per se* rule of cross-examination should not apply even to custodial statements made by co-defendants, Petitioner suggests an analogy to the approach taken by the Court in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Manson* v. *Braithwaite*, 432 U.S. 98 (1977) with regard to eyewitness testimony which may have been tainted by suggestive pre-trial identification procedures. New Mexico argues that in those cases the Court declined to apply a *per se* rule of exclusion even though the evidence may be difficult to effectively cross-examine. These cases permit the testimony to be elicited before the jury if the witness testifies that he is able to make an independent in-court identification or if his testimony is otherwise independently reliable. The key to admissibility is, however, the opportunity available to the defense to test accuracy of the identification and the possible influence of the suggestive procedures employed by police in eliciting the out-of-court identificant through the vehicle of cross-examination. *Watkins* v. *Sowders*, 449 U.S. 341, 349 (1981). Thus, it is cross-examination—the "greatest legal engine ever invented for the discovery of truth" in the words of Dean Wigmore—which serves to protect the accused from the prejudicial effect of tainted identification procedures or of circumstances suggesting lack of reliability of an in-court identification. *United States ex rel. Pella* v. *Reid*, 527 F.2d 380, 385 (2nd Cir. 1975) (noting that witnesses were "cross-examined at length as to the certainty of their identifications, thereby considerably reducing

the measure of possibility that Pella's conviction was based on mis-identification"). Petitioner's analogy to the identification cases is not helpful to its position precisely because those decisions look to cross-examination as the mechanism best designed to protect the accused from an unfair trial.

The lack of cross-examination of Boeglin was properly deemed fatal to conviction by the New Mexico Supreme Court because his custodial statement formed the basis and provided the only direct evidence for the state's case at trial. Once Boeglin refused to testify Earnest was deprived of any opportunity to test the matters asserted in the statement or Boeglin's motive, interest or bias in giving the statement. Earnest was essentially convicted on an out-of-court statement offered as substantive evidence less reliable that even an affidavit.

II.

THE NEW MEXICO SUPREME COURT CORRECTLY CONCLUDED THAT RESPONDENT'S CASE WAS CONTROLLED BY THE DECISION OF THIS COURT IN *DOUGLAS* v. *ALABAMA*, RATHER THAN BY THE DECISION IN *OHIO* v. *ROBERTS*.

In arguing that the New Mexico Supreme Court erred in reversing Earnest's conviction based on his inability to cross-examine co-defendant Boeglin regarding his custodial statement Petitioner asserts that the court erred in holding that "confrontation cannot exist without the opportunity for cross-examination." (Petitioner's brief, at 15). Petitioner's charge that the court below misapprehended the rule of *Ohio* v. *Roberts* is not supported by the language of the *Earnest* opinion. The state supreme court held that *Ohio* v. *Roberts* would not support admission of the Boeglin statement because that case dealt specifically with use of preliminary hearing testimony given by a witness unavailable for trial who had been subjected to cross-examination by the accused's counsel at the prior proceeding. *State* v. *Earnest*, 703 P.2d at 876. Here, there was no prior hearing at which Boeglin was cross-examined and the statement did not represent testimony taken under oath in

a prior proceeding. Thus, the New Mexico court rejected Petitioner's reliance on *Ohio* v. *Roberts* as justifying admission of the uncross-examined statement at Earnest's trial. The initial error made by Petitioner in evaluating the case has been to improperly suggest that New Mexico has adopted a *per se* rule of exclusion of all uncross-examined hearsay.

The second error made by Petitioner in relying on *Ohio* v. *Roberts* has been to argue that that decision stands for the proposition that "indicia of reliability" function as the core of the guarantee of "confrontation" made by the Sixth Amendment and that sufficiently reliable statements which fit within recognized exceptions to the hearsay rule may always be admitted without opportunity for cross-examination.

The approach advocated by New Mexico here is based on too broad a reading of the Court's decision in *Ohio* v. *Roberts*. Had the Court intended the decision to reverse the unbroken line of authority restricting admission of co-defendant confessions offered in the absence of an opportunity for cross-examination, it surely would have addressed this concern squarely. Instead, *Ohio* v. *Roberts* should be read in the context of the facts of the case, one involving use of prior, cross-examined testimony when a witness become unavailable to testify at trial. In this sense, three different categories of cases should be examined when focusing on *Douglas* v. *Alabama* as the controlling case on the facts presented here.

First, it is clear that there are numerous exceptions to the hearsay recognized by both Federal Evidence Rule 803 and Rule 803 of the New Mexico rules which permit introduction of hearsay which is of incidental significance except with regard to proof of facts relevant to a particular trial. These facts are admissible without regard to the availability of the declarant and generally are not inherently material or relevant in an independent sense. They may be highly probative, of course, to prove or support other evidence proving facts essential to the prosecution of either a civil or criminal case.

A second category of recognized exceptions under rules 804 of the federal and New Mexico rules, respectively, deal with

more inherently material statements that normally would form the basis for in-court testimony, but which may be admitted in certain instances where the declarant is shown to be unavailable to give live testimony at trial. These exceptions include most significantly uses of prior testimony given by the witness in a judicial proceeding or by deposition where the party against whom the evidence is offered had an opportunity to "develop the testimony by direct, cross or redirect examination." N.M. Evid. Rule 804(b) (1) (1978); Fed. R. Evid. 804(b) (1).

The availability of cross-examination at a prior proceeding has been the key to admissibility of the prior testimony at subsequent proceedings where the witness proves unavailable. In *Mattox* v. *United States*, 156 U.S. 237 (1895), for instance, the death of the witness following the accused's first trial did not bar use of the sworn testimony adduced at that proceeding in the re-trial. The *Mattox* Court concluded that "considerations of public policy and the necessities of the case" justified exception to the general rule requiring that the accused have an opportunity to cross-examine the witness against him, noting as well that the witnesses who had died after the first trial had been "fully examined and cross-examined on the former trial." *Id.* at 243; 240, respectively. The Court also noted recognized exceptions to the rule for dying declarations, well accepted at the time of adoption of the Constitution, *id.* at 243-244, and the exception recognized in *Reynolds* v. *United States*, 98 U.S. 145 (1879) where the absence of the witness from trial is procured by the accused.

Subsequently, in *Pointer* v. *Texas*, 380 U.S. 400 (1965) and *Barber* v. *Page*, 390 U.S. 719 (1968), the Court set limitations on the use of prior testimony within a confrontation/cross-examination framework. In *Pointer*, the testimony given by the subsequently absent witness was not subjected to adequate cross-examination by counsel appointed to represent the accused. The prosecution's failure to make a diligent effort to secure the attendance of the missing witness in *Barber* v. *Page* was there held to preclude use of the prior testimony. These cases establish the two-prong test for use of former testimony

in criminal prosecutions when a witness is not available to give live testimony at trial: (1) a showing of due diligence on the part of the proponent of the testimony to secure the attendance of the witness or that the witness is unavailable due to factors beyond the control of the party; and (2) an adequate opportunity for cross-examination by the party-opponent at the prior proceeding or deposition.

Thus, in *California* v. *Green*, the Court was able to equate the witness's claimed loss of memory with "unavailability" in justifying use of prior statements substantively against an accused who had previously had the opportunity to cross-examine the witness. This notion of unavailability has been incorporated in Rules 804(a) (3) in the federal and New Mexico evidence rules, respectively.

Distinguishing *Barber* v. *Page*, the Court in *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972) held that unavailability was demonstrated where the witness had moved to Sweden during the nine-year intervening period following trial before the accused was granted a new trial. Because the witness could not be found and was beyond the subpoena power of the court, there was no confrontation error in permitting the government to rely on the witness's testimony from the first trial where the accused had been afforded adequate opportunity for cross-examination. *Id.* at 216. The Court further rejected the accused's claim that ineffective assistance rendered by his trial counsel at that proceeding necessarily compelled the conclusion that his cross-examination was inadequate. *Id.* at 214-216.

It is in the context of these decisions that the Court's ruling in *Ohio* v. *Roberts* clearly fits and makes constitutional sense. In *Roberts* the witness had apparently been subjected to vigorous cross-examination at the preliminary hearing. 448 U.S. at 370. Rather that asserting that this decision marks a departure from prior decisions focusing on cross-examination as an essential element for determining admission of prior statements made by a witness unavailable to testify at trial, as does Petitioner here, Respondent suggests that *Roberts* really serves

more to refine a rule historically rooted in *Mattox*, *Pointer*, *Barber* v. *Page* and *California* v. *Green*.

In contrast to this general approach involving the admission of prior testimony of an unavailable witness, authorized in proper circumstances as a recognized exception to the hearsay rule, co-defendant statements have produced a more narrowly drawn rule of exclusion in the absence of opportunity to cross-examine the witness at trial. Uniformly, the decisions of this Court have rested on the conclusion that the Confrontation Clause requires cross-examination when the evidence offered consists of a statement made to law enforcement officers by an accomplice while in custody who is unavailable for cross-examination at trial and the prosecutor seeks to use the statement as substantive evidence.

The cornerstone of this rule is the Court's opinion in *Douglas* v. *Alabama*, decided in 1965. In *Douglas* the defendant and his accomplice were charged with assault with intent to commit murder and tried in separate trials. Loyd, the accomplice, had already been tried and convicted when the prosecution called him as a witness against Douglas. Although his case was on appeal and he attempted to assert his Fifth Amendment privilege against testifying the trial judge ordered him to testify. Based on Loyd's persistence in refusing to testify the prosecutor moved that he be declared a "hostile witness" and obtained permission to cross-examine him. In "cross-examining" Loyd, the prosecutor read the text of the statement, including those portions inculpatory as to Douglas, occasionally asking the witness to affirm whether or not he had made the statement. In response to each question Loyd asserted the privilege and neither confirmed nor repudiated the statement. 380 U.S. at 416-417. Douglas argued that this procedure violated his Sixth Amendment Confrontation Clause rights because he was not afforded an opportunity to cross-examine Loyd due to the witness's refusal to testify.

The Court concluded:

> In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. Loyd's alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the circumstances of the shooting, this formed a crucial link in the proof both of petitioner's act and the requisite intent to murder.

Id. at 419. In the most significant aspects, the facts surrounding the use of Boeglin's statement against Earnest mirror those recounted by the Court in *Douglas*. Boeglin's statement constituted the only direct evidence that Earnest participated at all in the murder for which he was convicted. The "corroboration" of the assertions in the confession in fact corroborated only factual evidence concerning the description of the offense which itself was not independently linked to Earnest. Thus, the statement here also "formed a crucial link in the proof both of petitioner's act and the requisite intent to murder."[2]

Second, as in *Douglas*, the prosecution at Earnest's trial offered the testimony of law enforcement officers who took the confession to testify that the statement was made by the nontestifying co-defendant. 380 U.S. at 417. The *Douglas* Court concluded that the opportunity to cross-examine the officers was inadequate to "redress this denial of the essential right secured by the Confrontation Clause"—the right to cross-examine the declarant. *Id.* at 419-420.

Third, the Court noted in *Douglas* that "Loyd could not be cross-examined on a statement imputed to but not admitted by him." *Id.* Similarly, Boeglin never adopted his statement nor admitted having made the statement.

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[2] Earnest was charged with first degree murder, (J.A. 4), which requires proof of a deliberate intent to take life under N.M. Stat. Ann. § 30-20-1 (1978) and was tried additionally on the allegation of aggravating circumstances, murder of a witness and murder during the course of kidnapping, which could have resulted in the death sentence being imposed. Boeglin's statement was the only evidence from which Earnest's alleged intent, if any, in participating in the offense could have been directly shown.

Fourth, as here, the Court observed that there was no evidence suggesting that Loyd's refusal to testify had been procured by the defendant. *Id.* at 420.

Petitioner attempts to distinguish *Douglas* on the ground that *Douglas* is more concerned with prosecutorial misconduct." (Petitioner's brief, at 19). New Mexico argues that because the prosecutor read the statement to the witness, continuing to disclose its contents to the jury despite Loyd's persistent assertion of privilege, the case turns on this misconduct in light of the prior decision in *Namet* v. *United States*, 373 U.S. 179 (1963). Petitioner then distinguishes the prosecutor's use of the statement in this case by recounting the steps he undertook in having the statement itself admitted into evidence once Boeglin was ruled unavailable after the grant of immunity failed to induce him to testify. Arguing that the prosecutor here proceeded in good faith, in contrast to the approach taken by the prosecutor in *Douglas*, Petitioner concludes that admission of the statement should not be deemed absolutely barred by that decision.

Respondent believes New Mexico misreads *Douglas* in concluding that the misconduct by the prosecutor prompted reversal. Petitioner argues that because Boeglin's statement was admitted into evidence at Earnest's trial "Earnest was convicted upon evidence rather than innuendo from unanswered questions." (Petitioner's brief, at 20). While it is clear that the Court was concerned that the prosecutor may have deliberately sought to use the witness's recurring assertions of the privilege to convey tacit affirmation of the facts related in the statement, this procedure was improper because it "created a situation in which the jury might improperly infer both that the statement had been made and that it was true." It was the substance of the statement, not the innuendo, that contributed to Douglas's conviction and required reversal. In *Douglas*, the prejudice from the prosecutor's actions flowed from the fact that the jury might infer from Loyd's refusal to answer that the statement was, in fact, his and that it was truthful. 380 U.S. at 419-420. The truth of the matters asserted in the statement could not be tested by cross-examination and, consequently,

the accused was convicted on evidence that the jury could have taken as true in the absence of any opportunity for Douglas to test the accuracy of the statement. The Court noted that cross-examination of the officers who identified the statement as Loyd's could not constitutionally substitute for cross-examination of the witness.

Similarly, in Respondent's case the jury was free to believe the statement which was introduced into evidence. Respondent was afforded no opportunity to ask Boeglin whether the statement was, in fact, his or whether the matters asserted in the statement were true. The fact that the statement itself was offered and admitted does not alleviate the prejudice occasioned by the jury's reliance on it as substantive evidence. *Douglas* and this case are really indistinguishable with respect to the source of the prejudice—admission of the statement into evidence against Earnest afforded the jury as great an opportunity to simply assume that it contained the truth as would have the prosecutor reading the statement to the jury but not offering it. Moreover, the fact that the trial court admitted the statement may have impliedly indicated the court's belief that the statement was reliable. In effect, of course, this notion forms the core of Petitioner's argument; that the statement should be admitted if found reliable by the trial court. This approach would virtually allow the jury presume the truth of the statement because it was admitted by the trial court without any further testing by the defense which could effectively negate the trial court's implied finding of reliability.

That *Douglas* rests on the denial of cross-examination rather than upon misconduct by the prosecutor in the way he handled use of the non-testifying co-defendant's statement is amply demonstrated by the decisions of this Court following the principle set down in *Douglas*.

In Bruton v. *United States*, 391 U.S. 123 (1968), the Court considered the question posed by *Douglas* from the opposite viewpoint. The accused and his co-defendant were tried in a joint trial at which the accomplice's confession inculpating Bruton was admitted as substantive evidence. The jury was instructed that the confession could not be considered as evi-

dence against Bruton and that inculpatory references to Bruton in the statement were to be disregarded. The Court held that this type of instruction was insufficient to insure that a conviction would not result from the jury's failure to adhere to it and its use of the uncross-examined, inculpatory portion of the statement as a basis for finding the defendant guilty. Id. at 129-130. *Bruton* rests squarely on cross-examination as an essential component of the constitutional guarantee:

> Here the introduction of Evans' confession posed a substantial threat to petitioner's right to confront the witnesses against him, and this is a hazard that we cannot ignore. Despite the concededly clear instructions to the jury to disregard Evans' inadmissible hearsay evidence inculpating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination.

Id. at 137.

The approach advocated by Petitioner would reverse *Bruton* as well as *Douglas* in expressly authorizing admission of uncross-examined custodial statements made by co-defendants as substantive evidence against an accused. *Bruton* is mentioned only obliquely by Petitioner in a footnote suggesting that its holding could be deemed to rest on evidentiary, not constitutional, grounds, (Petitioner's brief, at 23, n.5), because *Bruton* antedated adoption of the federal rules which recognize admissions against penal interest as a basis for exception to the hearsay rule.

While Petitioner's attempt to distinguish *Bruton* is intriguing, it fails to explain continuing adherence to the *Bruton* rule even after promulgation and adoption of the Federal Rules of Evidence and the continued vitality of Rule 14 of the Federal Rules of Criminal Procedure which provides for severance of trials when the government intends to introduce co-defendant statements and confessions in a joint trial. Moreover, the Report of the Senate Committee on the Judiciary specifically refers to the *Bruton* rule in its discussion of the adoption of the present Rule 804(b)(3):

> The House amended this exception to add a sentence making inadmissible a statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused. The sentence was added to codify the constitutional principle announced in *Bruton* v. *United States*, 391 U.S. 123 (1968). *Bruton* held that the admission of the extrajudicial hearsay statement of one codefendant inculpating a second codefendant violated the confrontation clause of the sixth amendment.
>
> The committee decided to delete this provision because the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and here, the sixth amendment's right of confrontation.

Fed. Rules of Evid. (West 1975). A provision specifically excluding co-defendant statements from the declaration against penal interest exception was included in Rule 804(b)(3) of the Uniform Rules of Evidence adopted in 1974. Rather than *Bruton* being modified by adoption of the federal rules and recognition of the declaration against penal interest exception, it appears that *Bruton* was well-recognized by the conferees in approving the final version of the rule adopted.

Petitioner's attempt to distinguish *Bruton* by reference to the subsequent adoption of the federal rules also fails in light of the line of cases applying the rule in this Court. *Harrington* v. *California*, 395 U.S. 250 (1969) (violation of *Bruton* rule harmless where evidence overwhelming); *Roberts* v. *Russell*, 392 U.S. 293 (1968) (applying *Bruton* retroactively in state prosecutions); *Nelson* v. *O'Neil*, 402 U.S. 622 (1971) (defendant must have opportunity to confront co-defendant when latter's confession is heard by the jury); *Schneble* v. *Florida*, 405 U.S. 427, 429-430 (1979) (following *Bruton*, holding "that the admission of a confession of a co-defendant who did not take the stand deprived the defendant of his rights under the Sixth Amendment Confrontation Clause, when that confession implicated the defendant.").

Even when the Court has deviated from the strict holdings of *Douglas* and *Bruton* it has done so only where the threat of

conviction based on use of the co-defendant's uncrossed statement is great. Thus, in *Parker* v. *Randolph*, 442 U.S. 62 (1979), the Court held that where interlocking confessions given by the defendants in a joint trial are introduced, the likelihood of prejudice resulting from consideration of the uncrossed statements is minimized by appropriate jury instructions and by the individual accused's own admission of culpability. The dissenters in *Parker* posited that the case could have been better decided by application of the harmless error analysis of *Harrington*. 442 U.S. at 82-84 (Stevens, J., dissenting). Certainly, where the state's evidence includes a defendant's own confession of guilt, properly admitted, the potential for an unjust verdict is diminished.

In *Tennessee* v. *Street*, ___ U.S. ___, 105 S.Ct. 2078, 2081 (1985), the Court considered use of a co-defendant's confession for purposes of impeaching the accused's trial testimony that his own confession had been coercively taken by authorities. The Court noted that the statement was not admitted as substantive evidence and not for purposes of proving the matters therein asserted, but for rebuttal and that the jury was so instructed on the appropriate use of the statement. Once again, the most compelling aspect of defendant's case was his own confession and his attempt to repudiate it at trial. The co-defendant's statement which virtually mirrored his own in significant respects was probative for impeachment because it reflected on defendant's credibility in claiming impropriety by law enforcement officials.

Neither *Parker* nor *Tennessee* v. *Street* reflect any departure from the *Douglas/Bruton* rule which precludes substantive use of a non-testifying co-defendant's custodial statement implicating the accused at trial. Earnest gave no confession and in his trial testimony he denied participation in the offense. The prosecution did not offer the statement as impeachment and, in fact, Earnest took the stand to deny participation in the offense only after the trial court admitted the statement.

Far from erring in reversing Earnest's conviction based on *Douglas* v. *Alabama*, the New Mexico Supreme Court correctly relied on that decision as factually controlling and requiring reversal where the accused is convicted on uncross-examined hearsay in the form of a custodial statement made by a co-defendant. *Douglas* and *Bruton* remain constitutionally correct interpretations of the Sixth Amendment's right to confrontation through cross-examination of statements made by unavailable accomplice-declarants.

III.

PETITIONER'S CONTENTION THAT CUSTODIAL STATEMENTS MADE BY ACCOMPLICES WHICH ARE JOINTLY INCULPATORY FALL WITHIN THE "DECLARATION AGAINST PENAL INTEREST" EXCEPTION TO THE HEARSAY RULE AND ARE, THUS, ADMISSIBLE UPON A SHOWING OF UNAVAILABILITY IS INCORRECT.

Petitioner contends that inculpatory statements made by an accomplice while in custody can be sufficiently reliable to justify their use against a non-confessing defendant at a trial in which the accomplice is not available for cross-examination. In so arguing, Petitioner asks this Court to find that such statements can bear sufficient indicia of reliability to justify admission without cross-examination and prays the Court remand to the New Mexico Supreme Court for a determination of whether those "indicia of reliability" are present in this case.

There is scant authority cited in Petitioner's brief to even suggest that accomplice confessions properly fall within a "recognized exception to the hearsay rule" the linchpin of the holding in *Ohio* v. *Roberts* upon which Petitioner relies. Further, although Petitioner moves the Court remand for a determination of whether the Boeglin statement can qualify for admission under the "indicia of reliability" test argued for, Petitioner makes several factual arguments supposedly supporting its claim.

Respondent addresses both the theoretical foundation for Petitioner's claim and the record available in this case to demonstrate that Boeglin's statement exhibits most, if not all, of the characteristics of accomplice statements made while in custody which render them inherently suspect.

A. The Adoption Of The Declaration Against Penal Interest Exception In The Federal Rules Of Evidence Did Not Contemplate Admission Of Co-Defendant Confessions Within The Framework Of The Exception.

Petitioner addresses the applicability of the declaration against penal interest exception to its position only tangentially in its brief. However, since its entire argument is predicated on reliance on this exception to justify admission of Boeglin's statement, providing sufficient indicia of reliability could be attached to the statement and the circumstances of its making, Respondent perceives that a review of the history of this exception in the adoption of the federal rules is essential to understanding the weakness in Petitioner's argument. First, it is important to note that the federal and New Mexico penal interest exceptions are identical in wording. Fed. R. Evid. 804(b)(3); N.M. R. Evid. 804(b)(4). Second, it is significant that Petitioner seeks to distinguish *Bruton* on the ground that the decision there was rendered prior to adoption of the federal rules and "took care to emphasize that the statement there was inadmissible under traditional evidentiary rules and fits no recognized hearsay exception." (Petitioner's brief, at 23). Thus, unless the Petitioner can show that with the adoption of the federal rules this exception was recognized to embrace accomplice confessions, the theoretical underpinning of its position is wholly void of support.

In fact, the history of the declaration against penal interest exception does not evince any intent to modify or alter the rule in *Bruton*. The notes of the advisory committee reflected an awareness of *Douglas* and *Bruton* in discussing whether accomplice confessions constituted declarations against penal interests, suggesting that they would come within the wording of the exception. However, the advisory committee expressly noted that the rule did "not purport to deal with questions of the right of confrontation." Fed. R. Evid. 804(b)(3) Advisory Committee's Note.

The report of the House Judiciary Committee reflects that the adoption of the Rule in no way was meant to authorize use of accomplice statements where cross-examination was available:

> . . . The Committee also added to the Rule the final sentence from the 1971 Advisory Committee draft, designed to codify the doctrine of *Bruton* v. *United States*, 391 U.S. 123 (1968). The Committee does not intend to affect the existing exception to the *Bruton* principle where the co-defendant takes the stand and is subject to cross-examination, but believed there was no need to make specific provision for this situation in the Rule, since in that event the declarant would not be "unavailable."

Fed. R. Evid. 804(b)(3) Report of House Committee on the Judiciary. The House, therefore, sought to expressly include in the federal rule defining the exception a codification of the *Bruton* rule. This language does not appear in the version adopted, as the Senate Judiciary Committee report explains:

> The House amended this exception to add a sentence making inadmissible a statement or confession offered against the accused in a criminal case, made by a co-defendant or other person implicating both himself and the accused. The sentence was added to codify the constitutional principle announced in *Bruton* v. *United States*, 391 U.S. 123 (1968). *Bruton* held that the admission of the extrajudicial hearsay statement of one codefendant inculpating a second codefendant violated the confrontation clause of the sixth amendment.
>
> The committee decided to delete this provision because the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and, here, the sixth amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise.

Fed. R. Evid. 804(b)(3) Report of Senate Committee on the Judiciary. The conference committee agreed with deletion of the House language relating to codification of the *Bruton* rule, noting "the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles." Fed. R. Evid. 804(b)(3) Conference Report.

Thus, it cannot be argued that *Bruton* was impliedly modified by recognition of the declaration against penal interest exception with the subsequent adoption of the federal rules.

Instead, the history of the Rule shows that *Bruton* was considered controlling with respect to the scope of the exception. Inclusion of the *Bruton* rule was deemed unnecessary and inappropriate in light of the purpose of the drafters, which was not to attempt codification of constitutional principles.

Interestingly, the Uniform Rules of Evidence, adopted in 1974, do provide an express limitation on the exception codifying *Bruton:*

> . . . A statement of confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused, is not within this exception.

Unif. R. Evid. (1974). Congressional review of the proposed federal rules ultimately resulted in the conclusion that a similar statement should not be included in the federal rule, but certainly not because the Congressional conferees believed that *Bruton* should or could in any sense be altered by the adoption of the declaration against penal interest exception.

Application of *Douglas/Bruton* to limit the scope of the penal interest exception does not, moreover, emasculate the value of the provision. In many civil contexts, the penal interest exception may prove important in establishing factual and intent elements of causes of action. This is particularly true in those actions in which civil and criminal liability may be seen to overlap, as in antitrust, fraud and civil RICO actions.

The interplay between constitutional evidentiary rules and the operation of the Federal Rules of Evidence is also reflected in the interplay between constitutional principles and traditional application of the hearsay rule and its many exceptions. In *California* v. *Green*, Justice White observed:

> . . . While it may readily be conceded that hearsay rules and the Confrontation Clause are generally designed to protect similar values, it is quite a different thing to suggest the overlap is complete and that the Confrontation Clause is nothing more or less than a codification of the rules of hearsay and their exceptions as they existed at common law. Our decisions have never established such a congruence; indeed, we have more than once found a violation of confrontation values even though the statements in issue were admitted under an arguably recognized hearsay exception.

399 U.S., at 155-156. This expression is consistent with the position taken by the Congressional conferees in concluding that the codification of constitutional evidentiary rules was not a goal in the promulgation and adoption of t[illegible] federal rules.

Clearly, the penal interest exception is one which requires further reference to constitutional guarantees of confrontation. The declaration may well satisfy the threshold requirements of the exception in a given situation and may be supported by indications of trustworthiness and, yet, still be inadmissible because the party against whom the confession is to be used is denied an opportunity to cross-examine the declarant.

Further, recent decisions in *Parker* v. *Randolph* and *Tennessee* v. *Street* reflect the development of the constitutional principle regarding use of these statements, as anticipated by the Report of the Senate Committee on the Judiciary in its evaluation of the language of Fed. R. Evid. 804(b)(3). Thus, a measure of flexibility in the rule has facilitated the development of case law indicating limited exceptions to the normal application of *Douglas/Bruton* focusing on cases in which the accused, as well as the unavailable co-defendant, has given an inculpatory statement which can properly be used substantively as evidence at trial. The "overlap" between constitutional requirements and the application of the hearsay rules and exceptions is demonstrated to be equally elastic to meet questions raised in particular cases.

What is clear, however, is that there is no pattern of authority emerging in this Court or in other jurisdictions justyifying admission of statements made by unavailable accomplices as substantive evidence against an accused. Indeed, in the cases relied upon by Petitioner, the statement offered was generally made in the context of an admission to a third person who was not a law enforcement officer or when the declarant was not in custody. In *State* v. *Parris*, 98 Wash.2d 140, 654 P.2d 77 (1982), for example, the statement was made by the unavailable

declarant to civilians whom he assumed to be bona fide drug dealers relating information necessary for the completion of a drug transaction. 654 P.2d at 83. The declarant was not in custody at the time and this statement could just as well have apparently been offered and admitted as a declaration of a co-conspirator made in furtherance of the conspirancy. In many co-defendant cases, of course, there is sufficient suggestion of agreement to show that the accomplice is a co-conspirator, justifying admission of declarations in furtherance of the conspiracy. *Anderson* v. *United States*, 417 U.S. 211 (1974) (federal co-conspirator basis for admissibility applies to statements made while the conspiracy is still in progress, a limitation "scrupulously observed" by the Court, *Id.* at 218); *Dutton* v. *Evans*, 400 U.S. 74 (1970) (Georgia's broader co-conspirator declaration rule permitting admission of statements made during concealment phase of the conspiracy not constitutionally invalid).

Petitioner's reliance on *State* v. *Barber*, 38 Wash.App. 758, 689 P.2d 1099 (1984), is also misplaced. In *Barber*, the evidence showed that the declarant's statement was not made in the context of custodial interrogation to police officers, inherently carrying with it the opportunity and motive to lie, but to a close friend. 689 P.2d at 1104. The Washington court found that the statements were independently corroborated, a requirement imposed by the *Parris* Court for inculpatory and exclupatory statements; and impliedly found further that the statements were made during the concealment phase of the conspiracy during which other statements made by the declarant and relied on by the accused to argue his unreliability were deemed consistent with a coverup of the murder.

Parris and *Barber* appropriately suggest that declarations against penal interest made to third parties rather than law enforcement officers and without an apparent motivation for untruthfulness should be evaluated in terms of the indicia of reliability test for admission. Whether these declarations could appropriately form the bulk of the prosecution's case or, standing alone, would be sufficient to convict is an unresolved question. But, admissibility of non-custodial statements made

without expectation of betterment constitute the types of statements which this exception addresses. Thus, in *United States* v. *Katsougrakis*, 715 F.2d 769 (2nd Cir. 1983), the critical aspect of the declarant's death-bed statement was that it was made to a friend and not to government agents in an attempt by the declarant to better himself in the face of impending prosecution. The statements were, moreover, independently corroborated after the fact by the payment of the "silence" money. *Id.* at 775.

Additionally, Respondent notes that another instance in which the penal interest exception may be properly relied upon for admission of an unavailable declarant's statement appears in *Maugeri* v. *State*, 460 So.2d 975 (Fla. App. 1984), *cause dism'd*, 469 So.2d 749. There, the victim of an execution style murder admitted to his girlfriend that he had stolen two kilograms of cocaine from the plane owned by the accused. The accused denied this motive for the offense, claiming instead that a comparatively modest sum of money had been taken. The court admitted the statement as a declaration against penal interest tending to show the accused's motive in ordering the killing of the deceased. There, the statement itself is inculpatory as to a matter collateral to the subject of the prosecution, even though it arguably inculpated both men in cocaine smuggling. The fact that the declaration made to the victim's girlfriend clearly implicated declarant in a serious crime, however, was deemed sufficient to show its reliability, and the substance of the statements provided evidence of the motive for the killing. The fact that the accused procured the absence of the witness by having them killed was not discussed as a basis for decision, but that aspect of the case might suggest the broader traditional rule permitting a showing of the prior relationship of an accused and his victim in a homicide prosecution.[3]

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[3] *See e.g.* Texas Penal Code Ann. § 19.06 (Vernon 1974): In all prosecutions for murder or voluntary manslaughter, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

While the *Douglas/Bruton* rule necessarily does limit the use of declarations against penal interest which might otherwise qualify for admission under the language of the exception, it does not result in a total lack of utility, as the foregoing decisions demonstrate. The rule does serve to restrict the prosecution's reliance on the most inherently suspect statements that could fall within the language of the exception—statements implicating the declarant and his accomplice(s) or co-defendant(s) while in custody and subject to interrogation by the police. These statements are so unreliable that they should only be admitted within the rubric of the exception if the declarant is available for cross-examination at the time of trial.

B. Custodial Statements Implicating The Declarant And Accomplices, Co-Con pirators And Co-Defendants Are Inherently Suspect And Should Not Be Admitted Into Evidence Without Affording The Accused An Opportunity For Cross-Examination Of The Declarant.

The inherent lack of reliability of statements given while in custody forms the recognized basis for the rule of *Douglas/Bruton* requiring an opportunity for cross-examination before the statement may be used substantively against an accused in an individual case. The statement introduced at Earnest's trial evinces most of the problems associated with such statements and the facts demonstrate another factor requiring application of *Douglas/Bruton*. The statement of co-defendant Boeglin provided the only direct evidence of Earnest's participation in the murder and the remaining circumstantial evidence would have been insufficient to support conviction. (*See Earnest* v. *New Mexico*, No. 84-6791, *cert. pending*. The issue raised there involves the trial court's declaration of mistrial after Boeglin refused to testify and the court concluded that in the absence of his testimony there was insufficient evidence to support conviction). There is no question that admission of Boeglin's statement was both highly prejudicial to Earnest and formed the core of the prosecution's case.

Prior expressions of opinion on the reliability of custodial statements in this context have demonstrated an apparent uniform opinion that these statements are insufficiently credible to support conviction. The Court's decision in *Douglas* was unanimous with division only in the theory upon which reversal should be predicated. 380 U.S. at 423 (Harlan, J, concurring; Stewart, J., concurring. Both justices would have relied on due process violation rather than the Confrontation Clause as the basis for reversal.). Following *Douglas*, Justice Harlan in *California* v. *Green* reiterated his previous position, noting that in *Douglas* the "only direct evidence" that the accused had committed the murder was the inadmissible confession. 399 U.S. at 186, n.20. In their separate opinions in *Bruton* Justices Stewart and White advanced quite different views on the disposition while sharing a similar viewpoint on the reliability of uncross-examined custodial statements made by accomplices. Justice Stewart concluded that severance was required whenever the prosecution sought to introduce a co-defendant's custodial statement and concurred in the disposition. He stated:

> . . . I think it clear that the underlying rationale of the Sixth Amendment's Confrontation Clause precludes reliance upon cautionary instructions when the highly damaging out-of-court statement of a co-defendant, who is not subject to cross-examination, is deliberately placed before the jury at a joint trial. A basic premise of the Confrontation Clause, it seems to me, is that certain kinds of hearsay [citations omitted] are at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, *whatever* instructions the trial judge might give. . . . It is for this very reason that an out-of-court accusation is universally conceded to be constitutionally *inadmissible* against the accused, rather than admissible for the little it may be worth. [emphasis in original]

391 U.S. at 137-138. In contrast, Justice White concluded that the lack of credibility inherent in such statements permits juries to be effectively instructed of the limited uses which can be made of them, protecting the non-confessing accused from being convicted by inference from the jointly-confessing matter asserted in the co-defendant's statement. Justice White, therefore, dissenting from the disposition in *Bruton*, summarizing his view of the unreliability of the co-defendant's custodial statement:

> [A co-defendant's] confession cannot compare with the defendant's own confession in evidentiary value. As to the defendant, the confession of the codefendant is wholly inadmissible. It is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. Furthermore, the codefendant is no more than an eyewitness, the accuracy of whose statement is open to more doubt than would be the defendant's own account of his actions. More than this, however, the statements of a codefendent have traditionally been viewed with suspicion. [citations omitted]. *Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.* Whereas the defendant's own confession possesses greater reliability and evidentiary value than ordinary hearsay, the codefendant's confession implicating the defendant is intrinsically much less reliable. [emphasis added].

391 U.S. at 141-142.

It is the likelihood that the accomplice, in custody and facing prosecution, will attempt to better his position by implicating others and shifting as much blame to them as possible that produces the inherent threat to the credibility of these statements, just as Justice White suggested in *Bruton*. This suspicion was also expressed by the Advisory Committee in commenting on the penal interest exception in noting the temptation for the suspect in custody to attempt to "curry favor with the authorities" in making a statement. Fed. R. Evid. 804(b)(3) Advisory Committee Notes. The incentive for the suspect is two-fold: first, to gain any benefit possible from making a statement helpful to police; and second, to use the statement to shift blame to others to facilitate plea bargaining or favorable treatment in return for giving testimony or to simply attempt to reduce culpability.

Lower courts have followed the lead of this Court in questioning the reliability of custodial statements generally. In *Olson* v. *Green*, 668 F.2d 421, 427-428 (8th Cir. 1982), *cert. denied*, 456 U.S. 1009, the court concluded that custodial statements made by third parties do not fall within "a firmly rooted hearsay exception" because the guarantee of reliability in such declarations against penal interest are insufficient to meet

Confrontation Clause requirements. The court held that while such statements might well satisfy state evidentiary rules, they are too inherently unreliable to be admitted without the opportunity for cross-examination. The *Olson* court relied on prior Eighth Circuit decisions in noting the "strong incentive" for the suspect to speak to police, "whether it be truthfully or falsely," citing *United States* v. *Love*, 592 F.2d 1022, 1026 (8th Cir. 1979). *See additionally, Olson*, 668 F.2d at 427, n.11 (refering to circuit decisions concluding that custodial statements are inherently unreliable in implicating accomplices).

Similarly, in *United States* v. *Sarmiento-Perez*, 633 F.2d 1092, 1102-1103 (5th Cir. 1981), *cert. denied*, 459 U.S. 834 (1982), the Fifth Circuit concluded that a suspect's custodial statement jointly inculpating himself and others inherently suffers from the possibilities of coercion in the inducement of the statement; motives for falsification in the attempt to curry favor with police and to inculpate others in order to alleviate culpability; and a desire to gain revenge when a conspiracy has "gone awry." These circumstances, which the Fifth Circuit concluded could not adequately be examined at trial, suggest that the statement made may not be so much a declaration against the declarant's interest, but in his interest.

In an earlier decision, *United States* v. *Alvarez*, 584 F.2d 694 (5th Cir. 1978), relied on both by the Washington court in *Parris, supra*, and by Petitioner here, the Fifth Circuit delineated the factors to be considered in assessing the reliability of a statement supposedly made against the decalarant's penal interest. These factors are: (1) apparent motive of the declarant to lie; (2) general character of the declarant; (3) whether the statement was heard by more than one person; (4) whether the statement is made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness. When the *Parris* court applied these factors it was able to conclude that the declarant's statement was reliable because there was no motive for the declarant to lie since it was made to a supposedly bona fide drug dealer during the completion of a drug transaction. There was no suggestion that the statement had been made in any type of desire to avoid

culpability; rather, the statement was made in a non-coercive context to persons not known to be police officers and was independently corroborated. Similarly, in *Barber, supra*, the Washington Court of Appeals could look to the fact that the statement had been made not in the context of custodial interrogation, but to a close friend soon after the crime was committed and when the declarant had no apparent motive to lie. 689 P.2d at 1104. Because the statement was independently corroborated, the Washington court concluded that the *Alvarez/Dutton* v. *Evans* factors for evaluating admissibility had been met.

The *Alvarez* factors are indeed valuable for evaluating admissibility of statements made in contexts other than custodial interrogation and judging admissibility where the witness will be unavailable despite good faith attempts to secure attendance at trial. Where the evidence indicated a motive for declarant to lie, for instance, the Washington Supreme Court held the statement could not be admitted in *State* v. *Ryan*, 691 P.2d 197, 205 (Wash. 1984). The decisions of this Court and circuit decisions previously cited show that this motive is apparent in all custodial statements jointly inculpating the declarant and others.

The Idaho Supreme Court arrived at a similar conclusion in *State* v. *Hoak*, 692 P.2d 1174 (Idaho 1984):

> Statements which tend to inculpate the accused must be carefully examined. The danger exists, particularly where the declarant is in police custody, that the statement was motivated by a desire to gain favor with the authorities in the hope of receiving a lesser charge or immunity from prosecution. Cross-examination in such instances is particularly important.

Id. at 1179. The court rejected the co-defendant's statement as reliable because it constituted an attempt to exculpate the declarant on a greater charge and was made while in custody under a promise of immunity. *Id.* at 1180.

The only authority relied on by Petitioner which actually supports its position that custodial statements are admissible without opportunity to cross-examine the declarant is *People* v. *Moore*, 693 P.2d 388 (Colo. App. 1984). Respondent submits that *Moore* was incorrectly decided. The court concluded that because the declarant, Sandoval, ultimately pleaded guilty and received an eight year prison term, there was no suggestion that he was attempting to better himself by giving the jointly-inculpatory statement. The proper analysis, however, focuses not on what ultimately happened—indeed, Sandoval's sentence might have been far less than that given Moore, who was convicted of attempted aggravated robbery, conspiracy to commit aggravated robbery and felony menancing while Sandoval was convicted only of attempted aggravated robbery—but what Sandoval might have thought he could gain at the time he made his statement. Analysis of subsequent events is inappropriate because it fails to account for the declarant's motive to lie at the time. Respondent would note further that the disparity in convictions is interesting in light of the fact that Moore was only the driver of the getaway vehicle and Sandoval and the other co-defendant actually attempted the robbery at the bank. 693 P.2d at 389-390.

In summary, the overwhelming weight of judicial expression has regarded custodial statements as inherently unreliable when jointly implicating the declarant and others and the declarant is not available to give live testimony and submit to cross-examination at trial. The inherently unreliable character of these statements requires their exclusion from trial unless cross-examination is available in spite of their otherwise superficial nature as being contrary to the penal interests of the declarant.

C. The Boeglin Statement In The Instant Case Demonstrates Exactly Those Factors Suggesting Unreliability, Rather Than Reliability, Which Bar Its Admission At Trial Without An Opportunity For Cross-Examination.

Petitioner has made a substantial effort at showing that Boeglin's statement could pass constitutional muster because of indications of reliability while nevertheless moving the Court to remand this cause to the New Mexico Supreme Court for the ultimate determination on this point. Consequently, Respondent also examines the statement, pointing to those aspects of

the statement and the circumstances in which Boeglin gave the statement to show why this statement lacks reliability in the same general sense that all custodial statements do. In evaluating these aspects of the case, two sources are extremely significant: first, the decision of the New Mexico Court of Appeals in *State* v. *Boeglin*, 100 N.M. 127, 666 P.2d 1274 (Ct. App. 1983) details many of the facts surrounding the making of the statement on the day of Boeglin's arrest; and second, the text of Boeglin's statement, which is included in the record here, (J.A. 10-22), as well as the actual tape of the statement, which Respondent believes may have been included with the tapes sent to the Clerk's office by the Clerk of the state supreme court.

The following factors question the integrity and reliability of the Boeglin confession:

1. Boeglin Was Not Sworn Before Giving The Statement.

The statement does not reflect that Boeglin was placed under oath before he gave his statement to Detective DeLuche and Deputy Carrasco. (J.A. 10). In *California* v. *Green*, Justice White observed that confrontation "insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury." 399 U.S. at 158.

2. Boeglin Had Not Been Advised By Counsel At The Time He Made The Statement.

During the course of making the statement, the following exchange took place between Detective DeLuche and Boeglin:

Q: Okay. Do you recall your rights? Your right to remain silent?

A: Yeah.

Q: That anything you say could and would be used against you in a court of law?

A: Uh-huh.

Q: That you have the right to have an attorney?

A: Yeah.

Q: With you while you're being questioned? If you cannot afford an attorney, one will be appointed, free of charge—doesn't cost you anything.

A: Okay. Ten thousand dollars up front.

(J.A. 11. In referring to the text of the statement in this brief, Respondent relates the corrected version without the correction marks and deleted sections that appear in the text reproduced in the joint appendix). In reviewing the above portion of Boeglin's statement it is important to understand that Boeglin had, prior to making the statement, contacted an attorney's office and talked with his secretary about representation. The opinion of the New Mexico Court of Appeals then relates:

> Shortly after 1:15 p.m., a message was received from the attorney's office that he would represent defendant if he received $10,000 "up front cash." A jailer relayed this information to defendant. Defendant indicated that he could not afford that amount of money. The record does not indicate that any effort was made by the State to provide defendant with a court appointed lawyer until the time of his arraignment.

666 P.2d at 1276. The opinion also relates that earlier in the day Boeglin had requested an attorney, then apparently waived the request. The court of appeals remanded the case to the trial judge for findings of fact regarding Boeglin's waiver of right to counsel. On review after the factfinding the court, in an unpublished opinion, held that Boeglin's statement given at 3:13 p.m. was inadmissible; this judgment was then reversed by the New Mexico Supreme Court in another unpublished opinion, which held the statement was admissible because Boeglin had initiated the conversation with the police. Respondent recognizes, of course, that he may not assert a denial of Boeglin's rights in attacking the constitutional correctness of admission of the statement against him.

Respondent contends, however, that the text of the statement shows that Boeglin did not consult with counsel prior to making his statement and apparently did not understand that

he would not have to retain counsel before gaining advice on whether or not to make the inculpatory statement. While lack of counsel does not apparently render the statement inadmissible against Earnest, it does indicate that Boeglin was certainly not dealing with the officers from a standpoint of expertise in giving the statement.

3. Boeglin's Statement Demonstrates That He Was Attempting To Make A Deal With Officers When He Made The Inculpatory Admissions.

Petitioner argues that the text of the statement shows that Boeglin "knew he would not be offered any advantage by confession" because DeLuche advised him that no deal could be made and that any statement he made would be used against him. Respondent agrees that DeLuche did advise Boeglin that no deals could be, the text is not so clear that his statements to Boeglin could be construed as having induced the statement. The record shows the following exchange:

Q: You understand that. Now, are you specifically waiving your right to an attorney to talk to us this second time?

A: Well, I was hoping I could make some kind of deal.

Q: Well, let me tell you this much about deals at this time—

A: 'Cause uh—you're asking me to—I've never snitched before, and if I do—

Q: I'm not asking you to snitch, or anything. You're using the wrong term, Mr. Boeglin.

A: Yeah, but if you go back inside—

Q: Okay.

A: —you're a dead man.

(J.A. 11). This initial exchange reflects both Boeglin's desire to "make a deal" and his fear of going to the penitentiary in the event he makes a statement. It also shows that DeLuche did not *refuse to offer any deals*, as Petitioner argues (Petitioner's brief, at 26), but that DeLuche indicated that no deals could be made "at this time." The exchange continues:

Q: First of all, I'm not offering you any deals. What I offered you this morning was, you tell the truth.

A: And what do I get—six months in the County Jail, then?

DeLuche did not tell Boeglin that he would not be facing a six month jail term. Instead, he promised to take Boeglin's information to the prosecutor *if* Boeglin told the truth:

Q: Uh, I'm not offering you any deals. All I will say to you, is—is—you give us the truth, and—we verify it to be the truth—first of all, you've already told me one story, but if we verify it to be the truth, Mr. Boeglin, then I will go to the prosecutor who's prosecuting the case, and I'll—I'll talk to him. And I'll talk to him. And I'll tell him what information you've given, and—and then that is completely up to the prosecutor. Do you understand.

A: Yeah.

(J.A. 12). Boeglin then related his fear for his safety, including his perception that he was already a marked man after giving a statement that morning in which he "didn't tell on nobody or nothing." DeLuche then returned to the subject of making a deal:

Q: Well—I—I told you, I can't make you a deal. You can tell me the truth, and if we find it to be the truth, that's—that's—that's fine. You can't give me half the truth.

A: Oh—I ain't planning to, but I expect something in return, too, like my freedom.

Q: Well, I am not going to offer you your freedom. I can't offer you your freedom. What I—I can do, is just what I told you I would do. If you give me uh—the information, and the truth, depending upon what your involvement is—I don't know what your involvement is at this point. You haven't told me. Now, for example, you—you say, Okay, I'm going to tell you the truth if you'll let me go, and I say, Fine, Mr. Boeglin,

we've got a deal, and you tell me, Okay, I was the one that cut his throat. Now, what kind of deal is that. That's stupid, isn't it? I don't have any idea what you're going to say to me, sir.

A: Yeah.

Q: And, until we know what the truth is—

A: Can you get a lie detector test, and put it in here on me

Q: Well, but I'm telling you until we know what the truth is—

(J.A. 12-13). Boeglin then reiterated his fear for his physical safety while confined. DeLuche then said:

Q: If you—if you have the information uh—that you're not involved in a homicide, but you're present during a homicide, or something like that, how does this endanger you?

(J.A. 13). Boeglin responded that it caused him to be treated as an informant. The questioning then continued:

Q: Well—Phillip—I understand your position—I really do. I'm not—I'm not—saying that uh—you're a good man, bad man, or indifferent man. I'm saying, you're the one with the problem. Let me—let me tell you this much—I don't know the information you have, and I'm not buying a pig in a poke. Okay?

A: Yeah.

Q: You've already—you've already told us one story. If you shot straight first crack out of the bag, it might have been different—but that's not what happened, is it? You're the one that's going to have to make some decisions, and I'll tell you this much, there is no District Attorney in the world who's going to sit down and make a deal with you when he has no idea what you're going to say.

A: I just don't want to get burned, Okay?

Q: Well—

A: I was there—I knew what happened. I can tell you everything. Now if you don't consider that worth a lot, that's fine, we can go to court, 'cause hell, I'll

probably could save my damn time any fuckin' way—don't make a shit to me.

Q: I'm telling you—you tell us the truth, we verify it, you're talking about polygraph, then that's up to the District Attorney, that's not up to me.

(J.A. 14).

Far from showing that Boeglin could expect no deal, this exchange shows exactly the opposite. DeLuche expressly told Boeglin that no deal could be made until he had told them what happened. DeLuche then told Boeglin he would relate his statement to the District Attorney. By implication, DeLuche induced Boeglin to make the statement with the expectation that once made and "verified" the District Attorney would consider making a deal with Boeglin. From Boeglin's perspective, he understood that he could make a statement and then try to deal with the authorities regarding his sentence, but that DeLuche would offer him nothing before hearing his story.

Moreover, DeLuche even suggested to Boeglin that he might simply have been "present," but not "involved" in the homicide, implying that Boeglin might minimize his participation in the offense. And in telling Boeglin that he knew Eastman's throat had been cut DeLuche indicated his knowledge of facts which would have to be corroborated before they would know that Boeglin was telling the truth. Interestingly, the only actual participation in the murder admitted by Boeglin was that he attempted to cut Eastman's throat: "I went to cut his throat, but it didn't cut—and I was—cut it again and it just barely cut it, and—I just dropped the knife after that—. . . ." (J.A. 17).

Petitioner contends that Boeglin's statement is reliable because DeLuche had foreclosed the possibility of any deals being made for his testimony. In fact, the record shows precisely the opposite, that DeLuche told Boeglin repeatedly that no deals could be made until after he told them the "truth."

The motive to "curry favor" with authorities is clearly evidenced by Boeglin's attempt to gain his freedom or an extremely light sentence in return for making the statement.

4. There Was Evidence That Boeglin Was Either Under The Influence Of Drugs Or Coming Down Off A Drug-Induced "High" On The Day He Was Interrogated.

Boeglin was interrogated four times on February 12th, the day of the offense. He admitted to having used methamphetamine prior to his arrest and that he had also used the drug prior to the commission of the homicide. 666 P.2d at 1277. Additionally, at trial witnesses Ahlstrom, a deputy sheriff; Charles Wyman, Boeglin's first attorney; and even DeLuche testified to circumstances indicating Boeglin was in an agitated mental state on the day of his arrest and interrogations. Ahlstrom testified that when he was with Boeglin he was quite emotional and that there were indications that Boeglin used drugs. (Tape 23/183-235). He also testified that he gave Boeglin coffee to calm him because he appeared to fearful. (Tape 23/270-323). Ahlstrom was not present during the third interview which resulted in Boeglin's confession.

Wyman testified that when he first saw Boeglin after 5 p.m. on February 12th and that Boeglin appeared "flat," "physically drained," that his eyes were bloodshot, that Boeglin had a tendency to stare and talk in a monotone, and that Boeglin slipped "in and out" during his interview with him. (Tape 20/225-460).

DeLuche testified that Boeglin admitted to him having used methamphetamine prior to being arrested, but that he did not have Boeglin tested to determine whether he was still under the influence of the drug prior to the interrogations. (Tape 13/546-560; 390-395). DeLuche testified that Boeglin appeared "hyper" during the interview, but that this was consistent with the demeanor of other suspects whom he had interrogated. (Tape 14/060).

The possibility that Boeglin was still under the influence of the methamphetamine when he gave his statement would not necessarily suggest that it is inherently unreliable, but coupled with other factors, would show a state of mind influenced by the paranoia commonly associated with drug abuse that could have influenced Boeglin to believe he should and could attempt to make a deal with police by giving a statement implicating

others. Significantly, even though Boeglin had admitted his usage of the drug prior to his being arrested, DeLuche took no steps to have him examined by a physician or psychologist to determine whether or not Boeglin's state of mind was appropriate for interrogation concerning a capital offense.

5. Boeglin's Inculpatory Statement Was Preceded By Two Denials Of Commission Of The Murder.

Respondent notes that while the Petitioner argues that Boeglin's 3:13 p.m. statement bears sufficient indicia of reliability to justify its admission at trial, the circumstances show that this statement was given only after Boeglin had denied commission of the offense twice during earlier interviews. 666 P.2d at 1276. During the two morning interview he did not make statements against his penal interest. The contradiction in his positions might be explained by the fact that by 3 p.m. he simply wanted to confess since his earlier protestations of innocence had not resulted in his freedom. However, the change in story might also be attributed to Boeglin's realization that he would have to make some kind of admission in order to gain release or make a favorable deal with the prosecution.

In this sense, Boeglin's third statement, albeit inculpatory to himself, must be viewed as something apart from the spontaneous utterance noted by the Fifth Circuit in *Alvarez*, *supra*, in looking to factors suggesting reliability of statements apparently made against penal interest of the declarant.

6. Boeglin's Statement Constitutes A Partial Defense To The Offense Charged And, Thus, Cannot Be Characterized As Having Been Made Against His Interest.

Petitioner argues that Boeglin's admission is clearly against his penal interest since it exposed him to liability for capital offense subject to punishment by death under New Mexico law. (Petitioner's brief, at 25). This argument is based on the admission that he had participated in a murder during kidnapping and having the purpose of killing a witnesses, two statutory aggravating circumstances which may justify the death

penalty in New Mexico. N.M. Stat. Ann. § 31-20A-5(B) and (G) (1981 Repl. pamp.).

In contrast to Petitioner's view, Respondent asserts that the statement itself constituted an attempt to exculpate Boeglin from the most serious aspects of the offense, either to reduce culpability or to suggest a basis for mitigation of his punishment. For example, Boeglin only admitted to attempting to cut Eastman's throat and accused "Rob" of shooting Eastman first. (J.A. 17).

Dr. Sweeny, the pathologist with the medical examiner's office who testified at trial, testified that the cause of Eastman's death was gunshot wound to the head, that there were two such wounds and that either would have been fatal. (Tape 19/423-462, 528). He also testified that the cut on the throat was not severe because it did not sever major arteries or veins. (Tape 19/342-419).

Assuming for purposes of argument that Boeglin was as familiar with New Mexico capital murder law as Petitioner assumes, Boeglin's statement can be characterized as "in" his self interest if he realized at the time he made it that he would be convicted for Eastman's murder eventually anyway. First, the statement is exculpatory as to Boeglin with regard to his level of participation in the murder itself. Under New Mexico law, an exculpatory statement offered by the prosecution against the accused must be either disproved by the state or taken by the jury as true and binding. *See State* v. *McGhee*, ___ N.M. ___, 703 P.2d 877, 880-881 (1985). Thus, the statement might well have spared Boeglin from the death penalty or even a first degree conviction because, it's taken as true, it showed that Boeglin was neither the "triggerman" nor contributed to the fatal wound inflicted.

Moreover, under the New Mexico death penalty statute, Boeglin's statement qualified for instructions on several of the mitigating circumstances set out by statute in N.M. Stat. Ann. § 31-20A-6 (1981 Repl. pamp.). These mitigating circumstances could have included the following based on the text of the statement: (B) that defendant participated in the offense while

under the duress or influence of another; (C) that the defendant's capacity was impaired such that he did not understand the criminality of his conduct or could not conform his behavior to the requirements of the law; (D) that he acted while under the influence of a mental or emotional disturbance; and (E) that he was an unwilling participant in the murder. Additionally, subsection (H) of § 31-20A-6 provides that it is a mitigating circumstance that the accused assisted authorities in their investigation of the offense, which Boeglin clearly did by giving the statement.

Because the deliberate intent required for first degree murder under New Mexico law can be negated by a showing that the accused acted while under the influence of drugs or alcohol, *see McGhee*, 703 P.2d at 879, Boeglin's explanation that the participants in the events of the 12th used methamphetamine prior to the murder could well have laid the groundwork for both a defense to first degree murder and mitigation in a death penalty sentencing proceeding while seeking to reduce hs own culpability by blaming others for the actual killing of Eastman.

The admissions in the statement and the fact of giving it were factors by which Boeglin could have sought benefit from confession to police, mitigating his own culpability at the expense of his co-defendants. For this reason, Boeglin certainly had a motive to lie and an expectation that he could ultimately gain some advantage in giving the statement, particularly if he could make a deal for his testimony.

Two other factors suggest the potential unreliability of Boeglin's statement:

7. Boeglin Never Adopted The Statement As His.

While DeLuche testified that the statement offered and admitted into evidence was Boeglin's it was never actually adopted by Boeglin before the jury because he was unavailable to give testimony. While the jury could easily have conlcuded that DeLuche was truthful, there was no way the jurors could be told whether or not the statement represented Boeglin's entire statement or whether he would contradict circum-

stances related by DeLuche under which it was reportedly given.

8. Boeglin Never Identified Earnest As The Person About Whom He Referred In The Statement.

There was no testimony indicating that Boeglin ever physically identified Earnest as one of the persons mentioned in the statement. The text of the statement itself includes a single reference to an individual named "Rod—or Rob, whatever his name is" and all subsequent references to that individual are apparently to "Rob." (J.A. 15, 17, 22). DeLuche did testify that he knew Respondent as "Rod." (Tape 16/037-046; 066-071; 088-094).

Petitioner argues that "it is clear that the person in question was Earnest" because the statement shows that the same person was present during the drug transaction and at the time of the arrest as the person who participated in the murder. (Petitioner's brief, at 4, n.2). This inference is not clear in the record, however. Earnest admitted being present at the time of the arrest and with the others on the night before the murder, but denied commission or presence at the murder. (Tape 23/677-700; Tape 24/169-199).

Boeglin's statement is replete with references to other individuals whom he did not know or could not identify by name. (J.A. 15-17). Even assuming that Boeglin did intend to refer to Earnest as the individual he called "Rob" that assumption does not suggest the type of reliability sufficient to support a first degree murder conviction and possible death sentence. Also interesting is Boeglin's statement that all four adult males were seated in the front (and only) seat of the El Camino that was driven to the scene of the offense. (J.A. 17).This is precisely the type of assertion warranting an area of cross-examination to ascertain whether there were really four people present at the time of the killing, or three.

Finally, quite apart from these factors indicating unreliability of the statement, Respondent finds no evidence in the record, particularly as related by Petitioner in its brief, that there was independent corroboration of Earnest's participation

in the offense. The corroboration related by Petitioner certainly shows that he participated in the offense and assisted officers in locating the murder weapon and other evidence of the offense. Not one item of that evidence is linked to Earnest by ownership or fingerprint. No physical evidence was offered at trial to show that Earnest participated in the crime. While the corroboration is substantial to show Boeglin's part in the offense, it is wholly lacking in independent support of Petitioner's conclusion that Earnest participated as well.

Viewing the facts surrounding the circumstances of Boeglin's confession and the text of the statement, it is clear that this statement fails to qualify as reliable under those factors noted by the *Alvarez* Court. The declarant's motive to lie was apparent. His character was poor and undermined by the inconsistency of his statements. Though heard by more than one person it was only heard by police personnel while given, although the tape does provide a way to test the accuracy of the statement as related by the officer-witnesses. It was not given spontaneously, but after earlier statements failed to gain his release. Finally, it was given while in custody to police in an attempt to make a deal for freedom or a light jail sentence. Applying the factors noted by Petitioner as criteria for admission of statements under the penal interest statement, this statement could never qualify even if it were not barred by the *Douglas/Bruton* rule.

CONCLUSION

The New Mexico Supreme Court correctly applied the rule of *Douglas* v. *Alabama* in reversing Respondent's conviction. That decision and the related decision in *Bruton* v. *United States* hold persuasively that the Sixth Amendment demands cross-examination of declarants whose custodial statements jointly implicating themselves and the accused are to be used substantively at trial. In the absence of an opportunity for the accused to cross-examine these declarants, whose statements are inherently suspect, the Confrontation Clause demands exclusion of their statements from trial. Respondent prays the Court affirm the judgement of the New Mexico Supreme Court in its application of *Douglas* v. *Alabama*, or alternatively, dismiss the petition as improvidently granted.

Respectfully submitted,

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REPLY

BRIEF

Supreme Court, U.S.
FILED
MAR 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-162

IN THE

Supreme Court of the United States

October Term, 1985

STATE OF NEW MEXICO,
Petitioner,

v.

RALPH RODNEY EARNEST,
Respondent.

ON WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

REPLY BRIEF FOR THE STATE OF NEW MEXICO

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March, 1986

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Supreme Court of the United States

October Term, 1985

STATE OF NEW MEXICO,
Petitioner,

v.

RALPH RODNEY EARNEST,
Respondent.

REPLY BRIEF FOR THE STATE OF NEW MEXICO

I.

RESPONDENT'S AND THE ACLU'S DISCUSSION OF THE RELIABILITY OF PHILLIP BOEGLIN'S CONFESSION IS IRRELEVANT TO THE ISSUE PRESENTED BY THIS APPEAL.

The issue presented by this case is whether the Confrontation Clause of the United States Constitution imposes a per se rule of exclusion of extrajudicial, uncross-examined statements by unavailable declarants. In the decision appealed from, the New Mexico Supreme Court held that this Court's holding in *Ohio*

v. Roberts, 448 U.S. 56 (1980), limits admission of prior statements to those that were made at an earlier judicial proceeding where the defendant was given the opportunity to fully cross-examine the declarant. *State v. Earnest,* __N.M.__, 703 P.2d 872, 876 (1985). The State of New Mexico asks this Court to reverse the New Mexico Supreme Court and remand the case for a determination of the reliability of the confession of Phillip Boeglin, respondent's co-defendant. The reliability of the confession is not an issue this Court must decide. Nevertheless, both respondent's brief and the ACLU *amici* brief, discuss at length the unreliability of Boeglin's confession. Respondent's Brief at 37-49, ACLU Brief at 42-46.[1]

The New Mexico Supreme Court did not analyze the reliability of Boeglin's confession in its opinion. Nor did New Mexico's petition for writ of certiorari address the reliability of Boeglin's confession. The respondent's and ACLU's lengthy discussions of the unreliability of the confession serve only to cloud the real issue this case presents. New Mexico petitioned this Court for a writ of certiorari because the New Mexico Supreme Court's opinion raises significant and recurring problems concerning the relationship between the rule against hearsay and the Confrontation Clause of the Sixth Amendment. Petition for Certiorari at 5. The resolution of the issue

[1] The ACLU *amici* cite extensively to facts contained in the record of Phillip Boeglin's trial. ACLU brief at 2-12. Those facts are not part of the record in this case. Furthermore, the *amici* seek to relitigate the issue of Boeglin's waiver of his right to counsel. The New Mexico Supreme Court determined that Boeglin made a knowing, voluntary, and intelligent waiver of counsel prior to making the confessions in this case. *State v. Boeglin,* No. 15243 (Feb. 23, 1984). The ACLU *amici* have additionally, materially misrepresented the facts contained in the record of Boeglin's trial. As those facts are not properly before this Court, the Petitioner declines to address those misrepresentations.

presented is not affected by the reliability of Boeglin's confession. Thus, this Court need not decide the reliability of the confession to reach the merits of the appeal.

II.

THE PER SE RULE OF EXCLUSION OF INCULPATORY DECLARATIONS AGAINST PENAL INTEREST WHICH RESPONDENT PROPOSES DOES NOT ACCOMMODATE THE STATES' INTEREST IN EFFECTIVE LAW ENFORCEMENT.

Respondent and the ACLU *amici* argue that custodial third party confessions should be subject to a per se rule of exclusion if the accused has not had a prior opportunity to cross-examine the declarant. Respondent's Brief at 32-37; ACLU Brief at 26-37. Inflexible rules of exclusion that may frustrate rather than promote justice are not favored by this Court. *Manson v. Brathwaite,* 432 U.S. 98, 113 (1977). The adoption of a per se rule of inadmissibility of custodial third party confessions would exclude an entire class of hearsay statements without regard for the reliability of the statements or the state's need for the evidence. Such a rule would also be contrary to the trend of this Court's Confrontation Clause analysis.[2]

[2] "The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant,' *Dutton v. Evans,* supra, at 89 and to afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement,' *California v. Green,* supra, at 161, ..." *Mancusi v. Stubbs,* 408 U.S. 204, 213 (1972).

The better approach in determining the admissibility of third party custodial confessions is the one adopted in *Roberts*. In *Roberts*, this Court held that a defendant's right of confrontation is not violated by the admission of inculpatory hearsay where the declarant is unavailable as a witness at trial, as long as the hearsay declaration "falls within a firmly rooted hearsay exception," or possesses "particularized guarantees of trustworthiness." 448 U.S. at 66. This approach furthers the mission of the Confrontation Clause of advancing "the accuracy of the truth determining process in criminal trials." *Tennessee v. Street*, 105 S.Ct. 2078, 2082 (1985) (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970)). *Roberts* recognizes that a state's competing interest in effective law enforcement may warrant dispensing with confrontation at trial. 448 U.S. at 64.

Roberts emphasizes that the Confrontation Clause reflects a preference for face-to-face confrontation at trial. *Id.* at 63. However, where that preference becomes impossible through the unavailability of the declarant, confrontation is satisfied by a sufficient showing of reliability. *Id.* at 65-66. The opinion in *Roberts* acknowledges that a state's competing interest in effective law enforcement may warrant dispensing with confrontation at trial. *Id.* at 64. Phillip Boeglin was unavailable to testify at respondent's trial. The State had no alternative means of introducing Boeglin's confession or the facts underlying the confession.

In some instances custodial third party confessions are reliable and trustworthy. The cases cited by respondent and the ACLU recognize this fact. Respondent's Brief at 29-37; ACLU Brief at 28-30. That is, none of the cases hold that such statements are subject to a per se rule of inadmissibility. On the contrary, the courts have closely examined the circumstances under which the statements were made and have determined the reliability of the statements on the basis of the facts of each case.

Petitioner agrees that close scrutiny is warranted in cases involving inculpatory declarations against interest made while the declarant was in custody.[3] Nonetheless, as the cases cited by respondent and the ACLU demonstrate, the courts have had no difficulty in scrutinizing these statements and rejecting them when they do not possess adequate indicia of reliability. Indeed, the standards formulated by the courts to determine the admissibility of inculpatory declarations against penal interest insure that the statements possess sufficient indicia of reliability to satisfy the Confrontation Clause. *See U.S. v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) (admission of inculpatory third party confessions conditioned upon a finding that corroborating circumstances "clearly indicate the trustworthiness of the statement.").

A per se rule of inadmissibility will deny the fact finder reliable evidence and in some cases the only evidence of the defendant's guilt. Such a rule fails to accommodate the state's interest in effective law enforcement.

III.

CONTRARY TO RESPONDENT'S AND THE ACLU'S ASSERTIONS, *DOUGLAS v. ALABAMA* AND *BRUTON v. UNITED STATES* DO NOT BAR THE ADMISSION OF PHILLIP BOEGLIN'S CONFESSION.

Respondent and the ACLU contend that Boeglin's confession was inadmissible under both *Bruton v. United States*, 391 U.S. 123 (1968) and *Douglas v. Alabama*, 380 U.S. 415

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[3] An inculpatory declaration against penal interest is one which implicates both the declarant and the defendant in criminal activity and is admitted against the defendant. Note, *Federal Rule of Evidence 804 (b)(3) and Inculpatory Statements Against Penal Interest*, 66 CALIF. L. REV. 1189, 1190 n.7 (1978).

(1965). Respondent's Brief at 14-25; ACLU Brief at 15-21. Neither *Bruton* nor *Douglas* addresses the constitutionality of admitting evidence under a hearsay exception. In *Bruton*, the Court expressly noted[1] that, "[t]here is not before us, therefore, any recognized exception to the hearsay rule insofar as Petitioner is concerned and we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." 391 U.S. at 128 n.3. Boeglin's confession was admitted pursuant to New Mexico's declaration against penal interest exception to the hearsay rule, N.M. R. Evid. 804 (b) (4).[4] App. at 39. The holding in *Roberts* demonstrates that this fact is significant.

In *Roberts*, this Court declared that the reliability of an out-of-court declaration "can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." 448 U.S. at 66. The Court has additionally emphasized that the Confrontation Clause allows the states considerable latitude to fashion and enlarge hearsay exceptions. *See California v. Green*, 399 U.S. 149 (1970) (testimony admitted under California rule of evidence which allowed prior inconsistent statements to be admitted as substantive evidence); *Dutton v. Evans*, 400 U.S. 74 (1970) (statement introduced under Georgia statute which provided for the admission of declarations of co-conspirators made during the concealment phase of the conspiracy).

The holding in *Bruton* "was tied to the situation in which it arose . . .." *Parker v. Randolph*, 442 U.S. 62, 75 n.7.[5] That

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[4] The trial court additionally found that Boeglin's confession possessed particularized guarantees of trustworthiness. App. at 39.

[5] This court has established a number of exceptions to the holding in *Bruton*. *See Harrington v. California*, 395 U.S. 250 (1969) (*Bruton* violation can be harmless error; further, *Bruton* may not apply where

Cont. p. 7

situation, unlike the situation here, did not involve the admission of evidence under a hearsay exception.

The same is true of *Douglas*; no hearsay exception was involved. *Douglas* involved an improper effort by the state to place prejudicial hearsay evidence before the jury by introducing the co-defendant's confession under the guise of refreshing his recollection. *Tennessee v. Street*, 105 S.Ct. 2078, 2083 (1985) (Brennan, J., concurring). *Douglas*, therefore, is a case of prosecutorial misconduct and distinguishable from *Earnest* on that basis.

CONCLUSION

The admission of Phillip Boeglin's confession is controlled by this Court's holding in *Ohio v. Roberts*. The State of New Mexico asks this Court to remand the case for a determination of the admissibility of Phillip Boeglin's confession consistent with that opinion.

Respectfully submitted,

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Footnote 5, Cont.

co-defendant admits to making earlier statement); *Nelson v. O'Neil*, 402 U.S. 622 (1971) (*Bruton* is not controlling when co-defendant testifies favorably for defendant and denies incriminating statement); *Parker v. Randolph*, 442 U.S. 62 (1979) (where co-defendant's confession "interlocks" with defendant's, *Bruton* violation will be harmless error); *Tennessee v. Street*, 105 S. Ct. 2078 (1985) (no *Bruton* violation where confession introduced for non-hearsay purposes).

AMICUS CURIAE

BRIEF

(3)

No. 85-162

Supreme Court, U.S.
FILED
DEC 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

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BRIEF OF THE STATE OF INDIANA, ARIZONA, CONNECTICUT, DELAWARE, GUAM, HAWAII, IDAHO, ILLINOIS, LOUISIANA, MONTANA, NEW JERSEY, OHIO, OKLAHOMA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WISCONSIN, AND WYOMING

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INTEREST OF THE AMICI CURIAE

The relationship between the traditional hearsay rule and the Sixth Amendment's Confrontation Clause has long been rather nebulous. Demonstrating a willingness to accommodate constitutional requirements to the practical realities of criminal prosecutions, the United States Supreme Court in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980) recast the law of confrontation. While *Roberts* imposes a constitutional preference for live testimony given under oath in the presence of the accused within the observation of the trier of fact and subject to cross-examination, secondary evidence is admissible when it is not feasible to secure the foregoing conditions, provided it comports with a standard of trustworthiness.

The amici curiae submit that this flexible approach to resolve Confrontation Clause issues is optimum since it is applicable to a broad range of cases.[1] To append to the *Roberts* rule a requirement that an opportunity must be available to cross-examine declarants as to any statements introduced at trial, would reduce the Confrontation Clause to nothing more than a constitutional hearsay rule subject to the many hearsay exceptions a state happened to approve. Such a requirement would paralyze the development of evidentiary law and would prevent the admissibility of otherwise reliable evidence.

The *Roberts* rule strikes an appropriate balance between the interests of the state and interests of an accused. Indeed, the prosecution has an interest in trying a defendant with every bit of incriminating evidence at hand. A defendant, however, has an interest in excluding all but the most reliable incriminating evidence. Where a declarant is available to testify, his or her hearsay statements are excluded. This protects the defendant without unduly prejudicing the prosecution because the prosecution may still secure the very same evidence in the more reliable form of live testimony. Where a declarant is unavailable to testify, a less demanding standard of exclusion is employed. A defendant is still protected because evidence that is too unreliable to be evaluated rationally by the trier of fact is excluded, yet the prosecution is not prevented from using the evidence, even if it is less reliable than live testimony, if it is the best evidence the prosecution can obtain.[2]

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[1] See, e.g., *Huggins v. Warden*, 715 F.2d 1050, 1055 (6th Cir. 1983) (excited utterance), *cert. denied*, ___ U.S. ___, 104 S.Ct. 980; *Hutchins v. Wainwright*, 715 F.2d 512, 516 (11th Cir. 1983) (statement of anonymous informant to police). *United States v. H & M, Inc.*, 562 F.Supp. 651, 668 (M.D. Pa. 1983) (statement against penal interest).

[2] It is well to note that a defendant cannot be convicted solely upon such evidence. In addition to such evidence, the state must present additional evidence which is sufficient, when combined with the other items, to support a finding of guilt beyond a reasonable doubt. See *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970). See also Westen, The Future of Confrontation, 77 Mich. L.Rev. 1185 (1979).

STATEMENT OF THE CASE

On February 12, 1982, the body of David Eastman was discovered near a highway in the area of Carlsbad, New Mexico. Eastman sustained two gunshot wounds to the head and his throat had been cut. On the same date, the Respondent and his co-defendants: Phillip Boeglin and Perry Conner, were driving Eastman's truck and were arrested. Later, Boeglin requested to speak with a prosecutor and gave a statement in which he not only described the murder of Eastman, but also incriminated the co-defendants. Specifically, Boeglin admitted to cutting Eastman's throat and stated that the Respondent shot Eastman.

The Respondent's first trial resulted in a mistrial. Prior to his second trial, the Respondent challenged the admissibility of Boeglin's statement. The trial court observed that the statement was self-incriminatory and noted the corroborating evidence from the first trial. The trial court, however, declined to rule on the admissibility of the statement until the statement was offered into evidence.

At trial, Boeglin, asserting the Fifth Amendment privilege against self-incrimination, refused to testify. Although use immunity was later granted to Boeglin, he continued to refuse to testify. Consequently, Boeglin was cited for contempt. Pursuant to a request by the Petitioner, the trial court declared Boeglin an unavailable witness. Thereafter, Dennis De Luche testified that he tape-recorded Boeglin's statement given on February 12, 1982. The tape, as well as, a transcript of the tape were admitted, over Respondent's objection, into evidence.

The Respondent was convicted of murder, conspiracy to commit murder, kidnapping, conspiracy to distribute controlled substances, and possession of controlled substances. On appeal to the Supreme Court of New Mexico, the Respondent argued, among other things, that

the admission of Boeglin's statement violated his right to confront witnesses pursuant to the Sixth and Fourteenth Amendments to the Constitution. The Supreme Court of New Mexico reversed the Respondent's convictions by ruling that the trial court erred by admitting Boeglin's statements into evidence. The Court stated that the Respondent's confrontation rights were violated. While the Supreme Court of New Mexico agreed that Boeglin was an unavailable witness, the Court refused to apply the "indicia of reliability" test set forth in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980) to Boeglin's statement.

SUMMARY OF THE ARGUMENT

The decision of *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980) strikes a proper balance between the interests of the state and interests of an accused in the resolution of the dilemma in the relationship between the hearsay rule and the Confrontation Clause. If a person is available to give incriminating evidence, the Confrontation Clause mandates the prosecution to produce the witness at trial, to place him under oath, to elicit the incriminating evidence by direct testimony, and to tender him for cross-examination. If the declarant, however, is unavailable to testify, he is not a "witness against" the defendant within the meaning of the Confrontation Clause. Thus, the prosecution may use the declarant's hearsay statements if the statements exhibit adequate indicia of reliability. To additionally require an opportunity to cross-examine declarants as to any statements introduced at trial would not only paralyze the development of evidentiary law, but also prevent the admissibility of reliable evidence.

ARGUMENT

An intractable problem in criminal trials is to reconcile an accused's constitutional right to be confronted with the witnesses against him with the government's invocation of various exceptions to the rule against hearsay. The Sixth

Amendment's Confrontation Clause, made applicable to the states through the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him." The United States Supreme Court has interpreted the Confrontation Clause as reflecting a preference for face to face confrontation at trial.[3] Indeed, the primary interest secured by the Confrontation Clause is the right of cross-examination. *Douglas v. Alabama*, 300 U.S. 415, 85 S.Ct. 1074 (1965). In essence, the Confrontation Clause envisions:

> a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief. *Mattox v. United States*, 156 U.S. at 242-243, 15 S.Ct. at 339-340.

If read literally, however, the Confrontation Clause would require the exclusion of any statement by a declarant not present at trial. If literally applied, the Clause would abrogate virtually every hearsay exception; a result that has been rejected as unintended and too extreme. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980). The Supreme Court has recognized that an absolute prohibition against the use of hearsay would severely and unjustifiably restrict the government's ability to prove its charges.[4]

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[3] See *California v. Green*, 399 U.S. 149, 157, 90 S.Ct. 1930, 1934 (1970) ("it is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause"); *Id.*, at 158, 90 S.Ct. at 1935 (cross-examination is the "'greatest legal engine ever invented for the discovery of truth,'" quoting 5 J. Wigmore, Evidence §1367 (3d ed. 1940).

[4] See *Mattox v. United States*, 156 U.S. 237, 243, 15 S.Ct. 337, 340 (1895) ("general rules of law of this kind, however beneficent in their operation and valuable to the accused, must occasionally give way to considerations of public policy and the necessities of the case").

In recognition of the states' interest in effective law enforcement and in the development and precise formulation of evidentiary rules applicable in criminal prosecutions, the Supreme Court has given a broad interpretation to the Confrontation Clause; an interpretation that neither subordinates the Confrontation Clause to the common law's hearsay exceptions nor absolutely prohibits the use of hearsay evidence. The state must produce any witness against the accused if production is reasonably possible. If the state demonstrates that the witness is unavailable, his excepted hearsay statement is admissible provided it meets a minimum standard of reliability. *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980). Several factors which are relevant in determining reliability are: whether the context of the statements and the persons to whom they were made suggest that they were reliable; whether the declarant had a motive for lying or problems with his or her memory or perception; and whether the declarant had personal knowledge of the identity and role of the participants in the crime. *United States v. Ammar*, 714 F.2d 238 (3d Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S.Ct. 344.

The requirement, posed by the Supreme Court of New Mexico, of giving an accused an opportunity to cross-examine a declarant as a prerequisite to the introduction of an incriminating statement contravenes the United States Supreme Court's desire to give the states more evidentiary leeway by severing the Confrontation Clause from the hearsay rule. Indeed, as the principal purpose of the Confrontation Clause is to ensure "an effective means to test adverse evidence," *Ohio v. Roberts, supra*, 448 U.S. at 65, 100 S.Ct. at 25-39, so its exceptions occur when the evidence sought to be introduced is so plainly trustworthy that "testing" by cross-examination is unnecessary. If the Confrontation Clause requires the state to produce all "witnesses against" a defendant and if "witnesses against" a defendant include all available witnesses, then the

Confrontation Clause would require the state to produce every hearsay declarant in person even where producing the declarant would be difficult, unavailing, and pointless. Such a result is clearly unintended by *Ohio v. Roberts, supra.*

Ohio v. Roberts, supra protects a defendant against unreliable evidence since it prohibits the prosecution from introducing evidence that is too unreliable to be rationally evaluated by the trier of fact. Beyond that, the Confrontation Clause provides additional protection to a defendant when evidence exists in several forms of varying reliability by requiring that the prosecution use the most reliable form whenever possible. Both the Confrontation Clause and *Ohio v. Roberts, supra*, ensure not only that a defendant will never be convicted on the basis of evidence that lacks minimum indicia of reliability, but also that where evidence exists in both written and oral form, the prosecution will present it in the better form of live testimony under oath and subject to cross-examination. To append to the *Roberts* rule an additional requirement that an opportunity must be available to cross-examine declarants as to any statements introduced at trial would undermine the development of evidentiary law and, most importantly, prevent the admissibility of otherwise reliable evidence.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of New Mexico should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

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INTEREST OF THE AMICUS CURIAE

The New Mexico Public Defender Department, a state agency created in 1973, has as its basic purpose the representation of indigent criminal defendants. Through the use of staff and contract attorneys, the Department handles nearly 22,000 trial and appellate cases annually, which number represents the great majority of persons charged with criminal offenses in New Mexico. The Department has represented, directly or indirectly, two of the three codefendants charged with the offenses underlying this proceeding.

In addition, the questions presented in this proceeding involve the admissibility of a confession under the New Mexico Rules of Evidence and under the state's interpretation of the right to confront witnesses as guaranteed by state and federal constitutions. Neither the Petitioner's Brief or the Brief of Amici Curiae (Attorneys General) discuss the issue presented under relevant New Mexico law. Several recent New Mexico cases have involved attempts by the prosecution to introduce the hearsay statement of an unavailable codefendant in a criminal trial.

The New Mexico Public Defender Department has an interest in these specific cases, and in the interpretation of state evidentiary rules and constitutional provisions which affect the rights of criminal defendants. The Department has sought and obtained the consent of both Petitioner and Respondent for leave to file this *amicus* brief on behalf of the Respondent. The Department believes this contribution should assist this Court in viewing the issue presented in light of relevant New Mexico caselaw.

For the foregoing reasons, the New Mexico Public Defender Department respectfully requests that this Court grant leave to file this brief as *Amicus Curiae,* in support of Respondent.

———o———

STATEMENT OF THE CASE

Philip Boeglin, Ralph Rodney Earnest, and Perry Conner were charged with the murder of David Eastman, and with other offenses connected with that charge. On the day of his arrest, defendant Boeglin made several statements to the police, including a confession given at 3:13 p.m., which inculpates Earnest. (J.A. 10-22.) Boeglin refused to testify at Earnest's trial, and the trial judge declared him to be an unavailable witness. Boeglin's confession was then admitted into evidence, over Earnest's objection. The tape recorded confession was played to the jury, and jurors were provided copies of the "transcript" of this confession. (J.A. 26-27.) The court admitted the confession for the truth of the matters contained therein. It therefore constituted hearsay under N.M.R.Evid. 802.

The trial court relied on *State v. Martinez,* 99 N.M. 353, 658 P.2d 428 (1983) to admit the confession. The New Mexico Supreme Court held that *Martinez* did not justify the admission of the confession because it is "distinguishable on its facts since the witness against Martinez later testified at trial, and Martinez was given an opportunity to cross-examine the witness." (J.A. 56); *State v. Earnest,* — N.M. —, —, 703 P.2d 872, 876 n.2 (1985).

The State has consistently argued that Boeglin's confession was admissible under N.M.R.Evid. 804(b)(4). (J.A.

at 39), Petitioner's Brief at 21. No other hearsay exceptions recognized in New Mexico justify the admission of this confession. The specific admissibility of the confession under Rule 804(b)(4) was addressed by defendant in his argument that the confession was not "against Boeglin's interest." (J.A. 35-36.) The New Mexico Supreme Court did not discuss the hearsay issue in its opinion.

———o———

SUMMARY OF THE ARGUMENT

The prosecution introduced the custodial confession of Philip Boeglin as evidence against Ralph Rodney Earnest in his murder trial. The confession inculpated Earnest. Boeglin refused to testify or be cross-examined regarding whether the tape recording in fact constituted his confession, whether the transcript was accurate, whether the confession was coerced or involuntary, or whether it was true. The confession constitutes the only direct evidence connecting Earnest with the shooting of David Eastman, and so was crucial to the State's case.

The confession is not admissible as a declaration against penal interest under New Mexico law. The only portions of it which are relevant to Earnest's guilt are not declarations against Boeglin's penal interest. The trial court erred in admitting this hearsay statement against Earnest. When similar evidentiary errors are recognized on appeal, New Mexico courts require reversal of the criminal conviction and remand the case for a new trial at which the evidence is excluded. While this hearsay issue

is not specifically discussed in the opinion below, the result reached by the court is correct under state precedents.

Petitioner argues that the court erred in the opinion below when it refused to apply tests established by this Court for the admission of hearsay evidence. This argument incorrectly interprets New Mexico law. New Mexico follows federal constitutional provisions, which generally require an opportunity for cross-examination before hearsay can be admitted against a criminal defendant. However, this is not an "inflexible rule" in New Mexico, as Petitioner asserts. New Mexico courts permit the introduction of hearsay evidence when they are presented with adequate indicia of the reliability of such evidence to ensure that the defendant receives a constitutionally fair trial.

The decision below correctly holds that Respondent was denied the right to confront the witnesses against him, and that he is entitled to a new trial. That decision should be affirmed.

———o———

ARGUMENT

I. BOEGLIN'S STATEMENT IS NOT ADMISSIBLE AGAINST EARNEST UNDER NEW MEXICO LAW.

In this proceeding, Petitioner argues that the confession is admissible as a declaration against penal interest, and that this provision is a "firmly rooted" hearsay exception within the meaning of *Ohio v. Roberts,* 448 U.S. 56 (1980). In making this argument, Petitioner ignores New Mexico decisions interpreting this hearsay exception and

other New Mexico authority under which Boeglin's confession is inadmissible.

A. The confession is not admissible as a declaration against interest under the New Mexico Rules of Evidence.

Rule 804(b)(4) of the New Mexico Rules of Evidence allows the admission of hearsay statements of an unavailable witness if, at the time of its making, the statement "so far tended to subject him to civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." The New Mexico rule as currently enacted is identical to Fed. R.Evid. 804(b)(3). New Mexico courts consistently hold that exceptions to the hearsay rule operate sparingly in criminal cases because of the defendant's constitutional right to confront witnesses and his inability to test the reliability of declarant's statements by cross-examination. *State v. Martinez,* 95 N.M. 445, 623 P.2d 565 (1981); *State v. Barela,* 97 N.M. 723, 725, 643 P.2d 287, 289 (Ct.App. 1982).

New Mexico specifically limited declarations against penal interest in *State v. Self,* 88 N.M. 37, 536 P.2d 1093 (Ct.App. 1975), holding the admission of a hearsay statement to be unauthorized by this exception. The New Mexico Court of Appeals reversed the defendant's conviction without reaching his claim that the admission of the hearsay violated his right to confrontation.

In *Self,* a witness was allowed to testify, over defendant's objection, to a hearsay conversation regarding where the declarant had obtained a pistol. The court of appeals

held that declarant's admission that he possessed the pistol, knowing it to be stolen, was a statement against his interest. The court also determined that the latter part of the statement, that declarant obtained the gun from Self, who obtained it in an armed robbery, was not against the declarant's interest. The court recognized the general rule that "circumstantial guarantees of reliability" can substitute for the right to cross-examination in proper circumstances, *see State v. Taylor,* — N.M. —, —, 704 P.2d 443, 451 (Ct.App.1985), and reasoned that the special trustworthiness of this exception is "supplied by the fact that people will ordinarily not state facts against their interest unless those facts are true." *Self,* 88 N.M. at 41, 536 P.2d at 1097. However, the court held:

> [I]n order to circumvent the usual requirement that testimony be given under oath and subject to cross-examination and the penalties of perjury, the precise matter offered for its truth ought to be against the interest of the declarant. It is not enough that some collateral portion of the conversation is against the interest of the declarant; otherwise the circumstantial indica of trustworthiness are not present to guarantee the reliability of the very matter being offered.
>
> • • •
>
> To sum up, in order for a statement to qualify as an exception to the hearsay rule, there must be a nexus between the assertion relevant to the issues in the given case and the circumstances which qualify the assertion as an exception to the hearsay rule.

Id. at 41-42, 536 P.2d at 1097-8. Under the facts of that case, the only part of the statement which was against the declarant's interest was irrelevant to a determination of

Self's participation in the armed robbery. The only relevant part of the statement to Self's case consisted of a hearsay declaration which was not admissible under this exception.

This decision prevents the introduction of Boeglin's confession as a declaration against penal interest at Earnest's trial. Those portions of the confession in which Boeglin inculpates himself, such as his admitted attempt to cut Eastman's throat, are irrelevant to Earnest's guilt or innocence. Those portions of the statement which are relevant, such as Boeglin's claim that Earnest shot Eastman, are not specifically against Boeglin's interest. Boeglin's attempt to inculpate Earnest has no inherent trustworthiness or reliability, and so is inadmissible under this hearsay exception. (See J.A. 17.) The entire confession consists of either irrelevant statements or inadmissible hearsay.

Rule 804(b)(4) specifically requires "corroborating circumstances" when a criminal defendant wishes to introduce a hearsay statement which would serve to exculpate himself. The same requirement should apply to this situation, where the prosecution obtains a custodial confession exculpating the confessor, and seeks to introduce it against another defendant. In *State v. McGee,* 95 N.M. 317, 621 P.2d 1129 (Ct.App.1980), the New Mexico Court of Appeals refused to permit the introduction of statements of an unavailable witness under this provision of Rule 804(b)(4), both because the statements "were not clearly against his penal interest" and because of the lack of corroborating circumstances. *Id.,* 95 N.M. at 320, 621 P.2d at 1133. In *McGee* and in *State v. Anaya,* 89 N.M.

302, 551 P.2d 992 (Ct.App.1976), statements offered by a defendant were properly excluded because of a lack of indicia of trustworthiness. Even where statements are offered by a defendant, so that confrontation is not an issue, New Mexico courts strictly construe the provisions of this hearsay exception.

If hearsay evidence clearly comes within this exception, New Mexico courts affirm its admission. *See State v. Perea,* 85 N.M. 505, 513 P.2d 1287 (Ct.App.1973) (hearsay statements constituted admissions that the declarants had purchased narcotics from the defendant). In *State v. Owens,* — N.M. —, 703 P.2d 898 (Ct.App.), *cert. quashed,* — N.M. —, 702 P.2d 1007 (1985), the New Mexico Court of Appeals approved the admission of tape-recorded telephone conversations under this exception. The court also applied the tests mandated by *Ohio v. Roberts* and ruled that the hearsay statements did not violate the confrontation clause. (See Point II, *infra,* regarding the confrontation clause analysis in *Owens*).

Under proper circumstances, New Mexico recognizes declarations against penal interest as sufficiently reliable evidence to be admitted as exceptions to the hearsay rule. Courts have also applied the test announced in *Ohio v. Roberts* to overcome a defendant's confrontation challenge to the admission of such evidence. However, the confession introduced here is not admissible as a declaration against interest because the "precise matters" implicating Earnest are not clearly against Boeglin's interests. This Court need not address the issue of whether a declaration against interest is a "firmly rooted" hearsay exception within the meaning of *Ohio v. Roberts* because the confession does not qualify for admission under that exception as interpreted in New Mexico.

B. The confession is inadmissible under analogous New Mexico law.

Besides its inadmissibility as a declaration against penal interest, the admission of Boeglin's confession violates defendant's constitutional right to confront witnesses, as that right is recognized under New Mexico law. As defendant argued below, the confession cannot be considered admissible as the declaration of a coconspirator because it was not made during the course of and in furtherance of a conspiracy. (See J.A. at 32-34); *State v. Farris,* 81 N.M. 589, 470 P.2d 561 (Ct.App.1970); N.M.R.Evid. 801(d)(2)(E).

New Mexico follows the holding of *Bruton v. United States,* 391 U.S. 123 (1968), that the admission of a codefendant's confession implicating the defendant denies him the right of confrontation, where the codefendant does not testify at trial. *See State v. Rondeau,* 89 N.M. 408, 416, 553 P.2d 688, 696 (1976). *Compare Nelson v. O'Neil,* 402 U. S. 622 (1971) (*Bruton* problems alleviated if codefendant later testifies at trial and can be cross-examined). The results reached in other New Mexico decisions, which find that such confessions do not fit within the coconspirator exception to the hearsay rule, are analogous to the result reached in this case, and support the decision below.

In *State v. Richter,* 93 N.M. 55, 596 P.2d 268 (Ct.App.), *cert. quashed,* 93 N.M. 8, 595 P.2d 1203 (1979), the confession of each defendant, implicating the other, was admitted at their joint trial. Neither defendant testified. The court held this practice violated the *Bruton* rule, stating, "The confession of a codefendant, who does not testify, is hearsay as to the other defendant but more importantly violates his right of confrontation guaranteed by the Sixth Amendment." *Id.* at 57, 596 P.2d at 270. The erroneous admission of hearsay under the coconspirator exception also led to reversal of convictions in *Farris* and *State v. Sheets,* 96 N.M. 75, 628 P.2d 320 (Ct.App.), *cert. quashed,* 96 N.M. 116, 628 P.2d 686 (1981).

Similarly, in *State v. Martin,* 53 N.M. 413, 209 P.2d 525 (1949), a codefendant incriminated Martin at their joint trial, and the trial court refused to allow the codefendant to be cross-examined. The New Mexico Supreme Court held that Martin had been deprived of the right of confrontation and granted him a new trial. *Compare State v. Martinez,* 102 N.M. 94, 691 P.2d 887 (Ct.App.), *cert. denied,* 102 N.M. 88, 691 P.2d 881 (1984) (where statement of unavailable codefendant falls within the coconspirator exception, admission of the statement does not violate defendant's confrontation rights); *and State v. Jacobs,* 91 N.M. 445, 575 P.2d 954 (Ct.App.) (where an opportunity for relevant cross-examination exists at trial, the admission of hearsay under the coconspirator exception does not violate confrontation rights), *cert. denied,* 91 N.M. 491, 576 P.2d 297 (1978). The decision below reached the correct result

under these cases, because the confession constitutes inadmissible hearsay and because defendant had no opportunity to cross-examine Boeglin.

Under New Mexico precedents interpreting federal case law, if hearsay evidence is erroneously admitted against a criminal defendant, the court should consider whether the error deprived the defendant of his right to confront witnesses. If no opportunity for cross-examination existed, and no circumstances indicate the reliability of the confession, its admission violates the confrontation clause. *See State v. Richter,* 93 N.M. 55. The admission of Boeglin's confession violated Earnest's constitutional right to confront the witnesses against him, as construed under New Mexico law.

II. THE DECISION BELOW IS CONSISTENT WITH STATE INTERPRETATIONS OF THE CONFRONTATION CLAUSE.

Petitioner argues that in the decision below, the New Mexico Supreme Court announced a radical departure from existing standards and proposed a rule which would "inflexibly exclude almost all hearsay from criminal trials." Petitioner's Brief at 9, 14-16. Some of the *dicta* in that decision is susceptible to such misinterpretation, but the holding of the case follow New Mexico precedent. While New Mexico law does grant greater admissibility to hearsay which provides an opportunity for cross-examination, courts nevertheless allow the admission of hearsay evidence under proper circumstances, even when no possibility of cross-examination exists.

A. New Mexico courts have established that the primary purpose of the Confrontation Clause is to provide for cross-examination.

New Mexico courts consistently prefer to admit hearsay which, either at the time the out-of-court declaration is made or at trial, allows a criminal defendant an opportunity to engage in meaningful cross-examination. *See State v. James*, 76 N.M. 376, 415 P.2d 350 (1966). New Mexico follows *Douglas v. Alabama*, 300 U.S. 415 (1965), in recognizing that the right of confrontation is secured by the right of cross-examination. *State v. Baldizan*, 99 N.M. 106, 654 P.2d 559 (Ct. App.), *cert. denied*, 99 N.M. 148, 655 P.2d 160 (1982).

Under this principle, New Mexico uniformly allows the admission of prior testimony at a later criminal trial if the witness is shown to be unavailable and if the opportunity for cross-examination was preserved at the earlier proceeding. *State v. Massengill*, 99 N.M. 283, 657 P.2d 139 (Ct.App.1983); *State v. Hibbs*, 82 N.M. 722, 487 P.2d 150 (Ct.App.1971). However, if the opportunity for cross-examination was insufficient at the earlier proceeding, the hearsay evidence is excluded. *See Millican v. State*, 91 N.M. 792, 581 P.2d 1287 (1978); *State v. Martino*, 25 N.M. 45, 176 P. 815 (1918). The harm caused a defendant by a lack of cross-examination at the time a statement was made, or when the hearsay was admitted, is cured by a later opportunity to cross-examine the witness regarding the hearsay declaration. *See State v. Martinez*, 99 N.M. at 356, 658 P.2d at 431; *State v. Pedroncelli*, 97 N. M. 189, 637 P.2d 1245 (Ct.App.1981). Convictions which have been secured by a denial of the right to fully cross-examine a witness regarding important testimony have been reversed. *See e.g., Sanchez v. State*, — N.M. —, 702 P.2d

345 (1985); *State v. Curtis*, 87 N.M. 128, 529 P.2d 1249 (Ct.App.1974).

The decision below follows established New Mexico precedent, which in turn relies on decisions of this Court. The court's ruling that the admission of evidence which fails to provide an accused an adequate opportunity to cross-examine the hearsay declarant violates the defendant's rights guaranteed by the confrontation clauses of state and federal constitutions should be affirmed by this Court.

B. New Mexico decisions allow the admission of hearsay evidence in criminal trials, despite the lack of a meaningful opportunity to cross-examine, when presented with sufficient indica of reliability.

Petitioner argues that the New Mexico Supreme Court erred in creating an absolute rule excluding hearsay evidence which had not been subject to cross-examination, and in "refusing" to apply the test announced in *Ohio v. Roberts* to Boeglin's confession. (See J.A. at 14.) This interpretation of the decision and of New Mexico law is incorrect. Several New Mexico decisions do admit hearsay evidence against a criminal defendant, despite the lack of cross-examination, based on sufficient indicia of reliability. New Mexico has codified 28 specific exceptions to the hearsay rule, not including the "catchall" exceptions and those types of statements defined as "not hearsay," which turn on theories of reliability as substitutes for the opportunity to cross-examine. *See State v. Self*, 88 N.M. at 41, 536 P.2d at 1097. Under a New Mexico law, "[d]enial of cross-examination is not a violation per se of the confrontation clause." *State v. Martinez*, 99 N.M. 48, 51, 653 P.2d 879, 882 (Ct.App.), *cert. denied* 99 N.M. 47, 653 P.2d 878 (1982).

In *State v. Owens*, 703 P.2d 898 the New Mexico Court of Appeals held that the admission of hearsay evidence as a declaration against penal interest did not violate the defendant's confrontation rights. Applying *Ohio v. Roberts*, the court affirmed the admission of the statements because their reliability was not challenged, because the recording was properly authenticated, and because the "utility of cross-examination was remote." *State v. Owens*, 703 P.2d at 904. Courts also applied *Ohio v. Roberts* to determine whether the admission of hearsay evidence under other exceptions violated the defendant's right to confrontation. *See State v. Martinez*, 99 N.M. 48; *see also State v. Martinez*, 102 N.M. at 97, 691 P.2d at 890, (holding that evidence from an unavailable coconspirator falls within a firmly rooted hearsay exception, and therefore does not violate confrontation rights).

In *State v. Austin*, Ct.App. No. 8337 (filed December 10, 1985), *cert. granted*, S.Ct. No. 16,201 (January 16, 1986), the New Mexico Court of Appeals applied the *Ohio v. Roberts* test to reverse a conviction which was based solely on hearsay evidence, despite the court's assumption that the hearsay documents were admissible as business records. The court relied on its findings that the evidence was crucial to the prosecution's case, that no other evidence was presented at trial which would allow the defendant the opportunity to test the reliability of the documents, and that no public policy considerations excused the state's failure to produce or establish the unavailability of the declarant. Since the record did not show that the utility of cross-examination was remote, the admission of the

hearsay documents violated the defendant's right to confront witnesses.

New Mexico decisions have also applied the criteria announced in *Dutton v. Evans*, 400 U.S. 74 (1970), to determine the admissibility of hearsay evidence. *See State v. Martinez*, 99 N.M. 48 (applying *Dutton and Ohio v. Roberts* tests); *State v. Lunn*, 82 N.M. 526, 484 P. 2d 368 (Ct.App.1971) (holding under *Dutton* that admission of hearsay testimony, under a recognized exception to the rule, nevertheless violated the defendant's confrontation rights); *see also State v. Rondeau*, 89 N.M. 408 (coconspirator hearsay); *State v. Dawson*, 91 N.M. 20, 570 P.2d 608 (Ct.App.1977) (public records exception). Other New Mexico cases uphold the admission of hearsay evidence in criminal trials, despite the lack of cross-examination, when there are sufficient indicia of reliability. *See State v. Quintana*, 98 N.M. 17, 644 P.2d 531 (1982) (dying declaration); *State v. Robinson*, 94 N.M. 693, 616 P.2d 406 (1980) (excited utterance); *State v. Vigil*, 24 N.M. S.B.B. 1301, 1306 (Ct.App.1985) (prior consistent statement); *State v. Maestas*, 92 N.M. 135, 584 P.2d 182 (Ct. App.1978) (statement of recent perception, with some opportunity to cross-examine declarant).

New Mexico follows the principle that the opportunity to cross-examine secures the right of confrontation. However, courts apply the *Ohio v. Roberts* test to admit hearsay evidence, despite the lack of cross-examination, when there are sufficient indicia of the reliability of the hearsay statement to ensure the defendant receives a fair trial. While *State v. Earnest* contains some *dicta* which might be read to upset the well-established

balance of rights, the holding of the court is consistent with state and federal law.

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CONCLUSION

Boeglin's confession does not fit within a "firmly rooted" exception to the hearsay rule, and it does not contain adequate indicia of reliability to justify its admission. Under analogous facts, New Mexico law calls for the reversal of a conviction obtained by the erroneous receipt of such evidence. The decision of the New Mexico Supreme Court, holding the admission of the confession violated defendant's constitutional right to confront the witnesses against him, should be affirmed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

No. 85-162

(5)

Supreme Court, U.S.
FILED
JAN 27 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

STATE OF NEW MEXICO,

Petitioner,

—v.—

RALPH EARNEST,

Respondent.

ON WRIT OF CERTIORARI TO THE NEW MEXICO SUPREME COURT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF NEW MEXICO AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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EDITOR'S NOTE

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members, dedicated to preserving and defending the rights guaranteed by the Constitution. With the consent of the parties, we file this brief amici curiae.

We believe that the decision in this case, which involves the interpretation of the Confrontation Clause of the Sixth Amendment, is potentially of far reaching importance to the fair administration of criminal justice in this country. Our goal in this brief is to provide the Court with a full statement of the pertinent facts and of the applicable legal precedents. In that way, we hope to show that the hearsay declarations that were excluded by the New Mexico Supreme Court--statements by an

alleged accomplice made in police custody and directly implicating respondent in criminal conduct--would be inadmissible under the evidentiary rules of virtually every state, including those of New Mexico, and are constitutionally inadmissible under firmly-established decisions of this Court.

STATEMENT OF FACTS

The State's brief focuses solely on respondent's second trial. A more complete factual statement demonstrates Phillip Boeglin's untrustworthiness as a "witness" and the central importance of his hearsay accusation to respondent's prosecution.

A. Boeglin's Interrogation

On February 12, 1982, in the early morning, the body of David Eastman was discovered off the highway, several miles

from Carlsbad, New Mexico. Eastman had been shot twice in the head and his throat was cut. That same morning, three men--Phillip Boeglin, Perry "Red" Conner, and respondent Ralph Earnest--were seen driving Eastman's pickup truck. They were arrested on homicide charges and transported to the local police station. (B 1276).[1]

Later that morning, at around 9:00 a.m., Boeglin was taken to the District Attorney's Office for interrogation.[2] After

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[1] "B" refers to the opinion in State v. Boeglin, 100 N.M. 127, 666 P.2d 1274 (Ct. App. 1983); "B*" refers to the opinion in State v. Boeglin, 82 Cr. 17 (Aug. 12, 1983); "B**" refers to the opinion in State v. Boeglin, Dkt. No. 7374 (N.M. Ct. App. Nov. 15, 1983). The two unpublished opinions are included as an addendum to this brief. "T" refers to the designated tape recording from respondent's first trial; "T*" refers to the designated tape recording from Boeglin's trial; "N.M. Br." refers to petitioner's brief in this Court; "App." refers to the appendix to that brief.

[2] According to the subsequent testimony of a prosecution witness, Boeglin was "terrified" and not thinking clearly at the time. (B 1276; B* 3).

being advised of his constitutional rights, Boeglin asked for an attorney, and his questioning was temporarily halted. (Id.). Approximately 15 minutes later, however, the interrogation was resumed. (Id.). In a recorded statement, Boeglin denied any association with Eastman or his murder. (Id.).

Boeglin was then "booked" at the county jail. After he repeated his need for counsel, he was permitted to telephone a local attorney, who was out of the office. (Id.). Shortly after 1:15 p.m., a jailer gave Boeglin a message that the attorney had called and was willing to represent Boeglin for $10,000 "up front cash." (Id.). Boeglin responded that he could not afford that sum and "cursed" his misfortune. (Id.; B** 3).

Frustrated in his effort to obtain counsel, Boeglin then asked a guard to

contact the District Attorney's Office.[3] The guard made a telephone call, and Boeglin was picked up and transported back to the District Attorney's Office. (B 1276).

At 3:13 p.m., two investigators commenced a new round of tape-recorded questioning. (Id. at 1277). Boeglin was advised of his constitutional rights, including his right to have counsel appointed for him without charge. He responded: "Okay. Ten thousand dollars up front." (App. 11). He was next asked whether he was waiving his right to counsel and replied that he was "hoping [he] could make some kind of deal." (Id.). The investigators told Boeglin that no promises could be made until the District Attorney

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[3] Boeglin was kept in the "blue room," a padded isolation cell, described by a witness as a "very, very distressing place" with "really no access to the outside world." (Tr. Suppression Hearing at 109-110).

reviewed any statement that he might make. (Id. at 14). They reminded him, however, that he was facing homicide charges and had "the weight" on him and was "going to have to make some decisions." (Id. at 15). Boeglin then began to cooperate. His statement--in which he named respondent Ralph Earnest as the person who had shot Eastman "between the eyes" and reported that he had tried twice to cut Eastman's throat but "just barely cut it"--is the subject of this case. (Id. at 10-22).[4]

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[4] Later that evening at 10:20 p.m., Boeglin gave another brief statement, which apparently was not inconsistent with his afternoon account. (B** 5).

Not surprisingly, Boeglin's statements have been the focus of extended litigation in his own case. After a hearing at which Boeglin did not testify, the trial court found Boeglin's statements admissible against him. Its ruling, which was unaccompanied by factual findings, was appealed to the New Mexico Court of Appeals. That Court remanded for a determination as to whether the State had met its burden of showing a valid waiver [cont'd. on next page]

B. Earnest's First Trial

Earnest's first trial commenced on January 3, 1983. After introducing its

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under Edwards v. Arizona, 451 U.S. 477 (1981). See State v. Boeglin, 100 N.M. 127, 666 P.2d 1274 (Ct. App. 1983). On remand, the trial judge denied Boeglin's motion for a further evidentiary hearing at which Boeglin proposed to testify and call witnesses. State v. Boeglin, 82 Cr. 17 (Order August 19 1983). On the existing record, the court found (i) that the 9:20 a.m. statement should be suppressed because it was taken after Boeglin's request for counsel; (ii) that the 3:13 p.m. statement was admissible because Boeglin had voluntarily initiated contact with the authorities; and (iii) that the 10:20 p.m. statement should be suppressed because Boeglin had not intiated that interview. State v. Boeglin, 82 Cr. 17 (August 12, 1983). On Boeglin's petition, the Court of Appeals reversed the trial court as to the 3:13 p.m. statement. State v. Boeglin, Dkt. No. 7374 (N.M. Ct. App. Nov. 15, 1983). It concluded that Boeglin had shown a desire for counsel and a "complete lack of understanding of the right to free counsel" and that his "waiver" was therefore unknowing. (Id.). The Court's ruling, however, was in turn reversed by the New Mexico Supreme Court. In an unpublished opinion, the Supreme Court concluded that the trial court's findings were supported by substantial evidence. State v. Boeglin, Dkt. No. 15,243 (Feb. 23, 1984).

circumstantial proof, the State called Boeglin to testify under a grant of use immunity. Prior to his being sworn, the court stated that without Boeglin's testimony there was insufficient evidence to support the charges. (T 19). The court then advised Boeglin's counsel that Boeglin would be sentenced to 30 years' imprisonment for contempt if he refused to testify. In that way, the court said, someone would "do the time" for Eastman's murder. (Id.). Earnest's counsel objected that these comments were unfairly coercive and sought a mistrial. (Id.).

Boeglin was then called as a witness out of the jury's presence and declined to answer the prosecutor's questions.[5] After

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[5] Boeglin's refusal was on advice of counsel, who informed the court that, in his judgment, the immunity order was not co-extensive with his client's Fifth Amendment privilege. (T 19). See infra n.6.

each refusal, Boeglin was held in criminal contempt and sentenced to one year's imprisonment, with the sentences to be served consecutively. His total contempt sentence was 26 years. When the contempt proceeding was completed, the court declared a mistrial, stating that it was doing so "on motion of the defendant." (T 20). Defense counsel then sought to withdraw his earlier motion, but the court rejected his application. The court observed: "Your motion for a mistrial was not in the best interest of your client . . . because at the point you made that motion . . . there had been no count . . . where they had shown all of the elements." (Id.).[6]

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[6] Boeglin's contempt adjudication and the necessity for the mistrial have spawned substantial litigation. Boeglin's conviction for contempt was vacated by the New Mexico Court of Appeals because, as his counsel had contended, supra n.5, the immunity order was defective. Specifically, [cont'd. on next page]

C. Earnest's Second Trial

At Earnest's second trial, which began on September 12, 1983, Boeglin again declined to testify and was again held in contempt.[7] This time, however, the state offered into evidence Boeglin's 3:13 p.m. statement on the theory that it was a declaration against interest and, as such,

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it did not protect Boeglin from the use of his testimony in a federal prosecution. See State v. Boeglin, 101 N.M. 567, 686 P.2d 257 (1984). Boeglin's 26-year sentence without a jury trial was also plainly unconstitutional. See Bloom v. Illinois, 391 U.S. 194 (1968).

Prior to his second trial, Earnest argued that his first trial had been terminated without manifest necessity and that a retrial was therefore impermissible. The New Mexico Supreme Court ultimately rejected that claim, finding that the mistrial had been entered at defense counsel's request. See State v. Earnest, 103 N.M. 95, 703 P.2d 872, 874-75 (1985). Earnest's petition to review that determination is pending before this Court. No. 84-6791.

[7] At that juncture, Boeglin's appeal from his first contempt adjudication was still pending in the New Mexico courts. See supra n.6.

excepted from the hearsay rule. N.M. Evid. R. 804(b)(4). The trial court permitted the statement to be introduced on the authority of State v. Martinez, 99 N.M. 353, 658 P.2d 428 (1983).[8] Earnest was convicted and sentenced to life imprisonment.[9]

D. Boeglin's Trial

Boeglin's own trial commenced on December 4, 1984. He testified in his own defense and told a new story that further

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[8] As the New Mexico Supreme Court subsequently ruled, the trial court's reliance on Martinez was misplaced. There, "the witness against Martinez later testified at trial, and Martinez was given an opportunity to cross-examine the witness." State v. Earnest, supra, 686 P.2d at 876 n.2.

[9] The State's brief accurately summarizes the circumstantial evidence that was offered at the second trial. (N.M. Br. 5-7). It fails to note, however, (i) that Earnest's fingerprints were not found on the murder weapon or at the crime scene and (ii) that a nitrate test on Earnest's hands for gunshot residue was negative.

relieved him from responsibility for Eastman's death. Boeglin told the jury that Earnest, whom he met for the first time the day before, had held a gun to him and ordered him to cut Eastman's throat. (T* 16). He further testified that Conner had fired the second shot into Eastman and that Conner had inflicted the cut to Eastman's throat that drew blood. (Id.). Boeglin also explained that he had made his statement to the police after being without sleep for 72 hours on a methamphetamine "run." (T* 14).[10] He made that statement, he testified, to gain lenient treatment from the authorities. (Id.).[11]

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10 Boeglin acknowledged that he had been addicted to methamphetamine and that he received much of his supply from Conner.

11 Boeglin testified as follows:

Q: Would you tell the jury what you meant [in the statement] by the word "deal?"

[cont'd. on next page]

SUMMARY OF ARGUMENT

Writing less than 20-years ago, Justice Stewart observed that it was "universally conceded" that a co-defendant's confession

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A: Well, I was hoping I could bargain with the District Attorney's Office. Because of the very fact, uh, when I was stopped and arrested, and I was searched by. . . . Mr. DeLuche, I believe that's his name. Uh, I was still on parole [for aggravated burglary]. And when Mr. DeLuche took my jacket off, I had a line of tracks running down my arm. Mr. DeLuche did inform me that he was going to call my parole people. At which time he did. The parole people, after I was booked into the county jail, my parole . . . probation officer, Ester Feaver, I believe that's her name, came over to see me. Asked me if I had been doing narcotic drugs and I told her that I had been injecting speed. And this was the deal that I was referring to.

Q: What were you expecting?

A: Well I knew that, uh, since I had been doing speed and that I had admitted to her it was a violation of my parole. I was expecting instead of going to the joint, maybe, doing county time.

(T* 14).

made in response to police interrogation was constitutionally inadmissible against an accused. Bruton v. United States, 391 U.S. 123, 137-38 (1968)(Stewart, J., concurring). Nothing has occurred in the past 20 years to alter that conclusion. Rather, as we demonstrate below, courts have consistently concluded that such custodial accusations are simply too untrustworthy to support a criminal conviction. Indeed, far from falling within a "firmly rooted" hearsay exception, custodial accusations have been excluded from evidence under the rules of virtually every jurisdiction, including those of New Mexico. Nor does the declaration at issue here have any special claim to reliability to justify its admission and thereby defeat respondent's fundamental right to confront his accuser.

ARGUMENT

I. THIS COURT'S PRECEDENTS PRECLUDE THE ADMISSION OF BOEGLIN'S CUSTODIAL ACCUSATION

Unbroken precedents of this Court preclude the admission of Boeglin's extrajudicial accusation. To be precise, four landmark decisions of this Court are contrary to petitioner's position.

Douglas v. Alabama

Directly on point is this Court's decision in Douglas v. Alabama, 380 U.S. 415 (1965). There, a co-defendant, who had previously been convicted, was called as a witness at petitioner's trial and invoked his Fifth Amendment privilege in response to questioning. Under the guise of refreshing the co-defendant's recollection, the prosecutor then read the co-defendant's

confession to the jury. In this way, the jury learned that the co-defendant, while in custody, had implicated petitioner in the crime.

Emphasizing that the primary objective of the Confrontation Clause was "to prevent depositions or ex parte affidavits . . . being used against the prisoner in lieu of a personal examination and cross-examination," id. at 418-19, quoting Mattox v. United States, 156 U.S. 237, 242 (1895), this Court reversed petitioner's conviction. The Court held (i) that "petitioner's inability to cross-examine [his co-defendant] as to the alleged confession plainly denied him the right to cross-examination secured by the Confrontation Clause," id. at 419, and (ii) that the error was prejudicial since the statement "bore on a fundamental part of the State's case against petitioner." Id. at 420. Exactly those same conclusions apply here, since Earnest was unable to

cross-examine Boeglin to test his accusation and since that accusation was critical to the prosecution.

The State, however, reads Douglas as "concerned with prosecutorial misconduct" and not with cross-examination rights. (N.M. Br. 19-20). The very language of the Court's opinion--emphasizing the "denial of the essential right" to cross-examination, id. at 420--belies this interpretation. Moreover, this Court has consistently emphasized that Douglas involved a "flagrant violation of the defendant's right of Confrontation." Dutton v. Evans, 400 U.S. 74, 84 (1970). Accord, California v. Green, 399 U.S. 149, 162-63 (1970); Bruton v. United States, 391 U.S. 123, 127-28 (1968). Indeed, if the State were correct, a prosecutor could do directly what the Douglas prosecutor sought to do indirectly--i.e., present an untested custodial

accusation to a jury as the principal evidence of a defendant's guilt.

Bruton v. United States

Likewise dispositive is this Court's decision in Bruton v. United States, 391 U.S. 123 (1968). There, this Court considered the efficacy of limiting instructions to protect a defendant from the admission of a co-defendant's custodial confession at their joint trial. The Court noted that the case was "analogous to" Douglas and that the co-defendant's confession had added substantial weight to the prosecution "in a form not subject to cross-examination." Id. at 126-28. It then repudiated the assumption that the "encroachment on the right to confrontation" could be alleviated by such instructions.

Id. at 128.[12] Bruton controls here. For if the right to confrontation is violated when

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12 The Court observed:

> [The co-defendant's] oral confessions were in fact testified to, and were therefore actually in evidence. That testimony was legitimate evidence against [the co-defendant] and to that extent was properly before the jury during its deliberations. Even greater [than in Douglas] then, was the likelihood that the jury would believe [the co-defendant] made the statements and that they were true--not just the self-incriminating portions but those implicating petitioner as well. Plainly, the introduction of [the co-defendant's] confession added substantial, perhaps even critical, weight to the Government's case in a form not subject to cross-examination, since [the co-defendant] did not take the stand. Petitioner thus was denied his constitutional right of confrontation. 391 U.S. at 127-28.

See also id. at 137-138 (Stewart, J., concurring) (such a hearsay accusation is "at once so damaging, so suspect, and yet so difficult to discount, that jurors cannot be trusted to give it the minimal logical weight it deserves. . . . It is for this very reason that [such] an out-of-court accusation is universally conceded to be constitutionally inadmissible against the accused. . . .")(emphasis in original).

a co-defendant's statement is introduced with instructions that it be ignored, it is surely violated when such statements are introduced and relied upon as the critical evidence of a defendant's guilt.

The dissenting opinion of Justice White, while believing that limiting instructions were an adequate safeguard, was equally emphatic in asserting the inherent unreliability of custodial accusations untested by cross-examination:

> [A co-defendant's] confession cannot compare with the defendant's own confession in evidentiary value. . . . It is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. Furthermore, the codefendant is no more than an eyewitness. . . . More than this, however, the statements of a codefendant have traditionally been viewed with special suspicion. . . . Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence.

391 U.S. at 141 (emphasis added)(citations omitted).[13]

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[13] Petitioner seeks to distinguish Bruton in a footnote (N.M. Br. 23 n.5), arguing that it pre-dated recognition of the penal-interest exception to the hearsay rule. This is simply untrue. Prior to Bruton, there was a "growing tendency in the courts to follow Mr. Justice Holmes' dissent in Donnelly and recognize an exception for declarations against penal interest." United States v. Dovico, 380 F.2d 325, 327 n.2 (2d Cir.), cert. denied, 389 U.S. 944 (1967). See also People v. Leach, 15 Cal. 3d 419, 541 P.2d 296, 311-12 n.17 (1975), cert. denied, 424 U.S. 926 (1976)(noting that the decision in Harrington v. California, 395 U.S. 250 (1969), which followed Bruton, was decided "long after California had . . . become a jurisdiction permitting evidence of declarations against penal interest to be admitted at trial"). Moreover, as we show in Point II infra, a co-defendant's jailhouse confession is inadmissible against a defendant under the penal-interest exception in virtually every jurisdiction, including New Mexico.

Furthermore, in recent years, this Court has repeatedly reaffirmed Bruton's central teaching. See Parker v. Randolph, 442 U.S. 62, 72 (1979)("prejudicial impact" of co-defendant's statement is "too great . . . to be cured by limiting instruction"); Schneble v. Florida, 405 U.S. 427, 429-30 (1972)(Bruton holds "that the admission of a confession of a co-defendant who did not take the stand deprived the defendant of his

[cont'd. on next page]

California v. Green

The Court's decision in California v. Green, 399 U.S. 149 (1970), is also at odds with petitioner's position. In Green, the Court considered the constitutional admissibility of two statements: a witness's preliminary hearing testimony and his stationhouse confession. The witness had testified at defendant's trial, but claimed a loss of memory as to the underlying events. Id. at 152. The Court upheld the admission of the preliminary

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rights under the Sixth Amendment Confrontation Clause, when that confession implicated the defendant"); Nelson v. O'Neil, 402 U.S. 622, 626 (1971) ("we held that where the jury hears the co-defendant's confession implicating the defendant, the co-defendant becomes in substance, if not in form, a 'witness' against the defendant . . . [whom] the defendant must constitutionally have an opportunity to 'confront'"); Roberts v. Russell, 392 U.S. 293 (1968) (admission of co-defendant's "extrajudicial confession implicating defendant violate the defendant's right of cross-examination secured by the Confrontation Clause").

hearing testimony because the defendant had had an opportunity for cross-examination at the hearing. Id. at 165-68. The statement to the arresting officer, however, was viewed differently. As to that statement, the Court remanded the case to the California Supreme Court to determine "[w]hether [the witness's] apparent lapse of memory so affected Green's right to cross-examine as to make a critical difference in the application of the Confrontation Clause." Id. at 168.

That outcome is directly relevant here. If an untested accusation were constitutionally admissible, as petitioner contends, then the remand in Green would have been unnecessary. Instead, Green, like Douglas and Bruton, recognizes that the use of such an ex parte "confession" was "the particular vice that gave impetus" to the Confrontation Clause. Id. at 156. In the absence of cross-examination, such an

accusation cannot pass constitutional scrutiny.[14]

Dutton v. Evans

Dutton v. Evans, 400 U.S. 74 (1970), also compels the exclusion of Boeglin's statement. There, this Court considered the constitutional admissibility of a co-defendant's cryptic statement to a fellow inmate that arguably implicated the defendant in the crime. The Court upheld the admission of the statement but only because (i) it was not "crucial" or

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[14] Petitioner cites to Justice Harlan's concurrence in California v. Green. (N.M. Br. 15). What petitioner fails to note is that Justice Harlan concluded there that untested custodial accusations were too unreliable to support a criminal conviction. 399 U.S. at 186-87 n.20, 189; see also Dutton v. Evans, 400 U.S. 74, 98 (1970)(Harlan, J., concurring)(exclusion of such evidence is "universally accepted"). See also Westen, Confrontation and Compulsory Process: A Unified Theory of Evidence for Criminal Cases, 91 Harv. L. Rev. 567, 600 n.98 (1978).

"devastating" evidence; (ii) it did not involve the "use, or misuse, of a confession made in the coercive atmosphere of official interrogation"; (iii) it fell within a "co-conspirator exception to the hearsay rule long established under state statutory law"; (iv) it "contained no express assertion about past fact"; and (v) the declarant "had no apparent reason to lie [to his fellow inmate]." Id. at 87-89.

Of course, the precise opposite is true in this case. Boeglin's declaration was crucial evidence; it was made in response to official interrogation; there was ample reason for him to implicate Earnest falsely; his statement was entirely a narrative of supposed past fact; and, as shown in Point II infra, the statement did not fall within a hearsay exception recognized in New Mexico or elsewhere. Thus, the very reasons that supported the admission of the extrajudicial

declaration in Dutton require the exclusion of Boeglin's accusation here.

II. CUSTODIAL ACCUSATIONS ARE PRESUMPTIVELY UNRELIABLE

Petitioner argues that Boeglin's custodial accusation was sufficiently reliable to warrant its admission at respondent's trial. The considered judgment of every federal court that has addressed the matter, of virtually every state court, and of the leading scholars on the law of evidence, however, is to the contrary.

A. Federal Precedents

The rule that one person's confession is inadmissible against another is a venerable one. See Tong's Case, Kelyng, J. 17-18, 84 Eng. Rep. 1061-62 (K.D. 1663). It was first enunciated by this Court in 1892

in Logan v. United States, 144 U.S. 263, 309-10. Thereafter, the rule was repeatedly applied and recognized to be part of the more general principle that a co-conspirator's declarations are inadmissible unless made in the course of and in furtherance of the criminal enterprise. See Wong Sun v. United States, 371 U.S. 471, 490 (1963); Lutwak v. United States, 344 U.S. 604, 617-18 (1953); Krulewitch v. United States, 336 U.S. 440, 443 (1949); Fiswick v. United States, 329 U.S. 211, 217 (1946); Sparf v. United States, 156 U.S. 51 (1895); Brown v. United States, 150 U.S. 93, 98-99 (1893). These cases make plain that a federal prosecution must proceed without such hearsay "in the regular way, so as to give the accused the opportunity to cross-examine the witness or

witnesses." Brown v. United States, supra, 150 U.S. at 99.[15]

These cases predate the Federal Rules of Evidence, but recent decisions under those rules are to the same effect. More specifically, every federal court that has considered the issue has concluded that a custodial accusation, such as Boeglin's, is inadmissible hearsay. See United States v.

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16 In Wong Sun v. United States, the Court quoted Glanville Williams on the dangers that inhere in such accomplice declarations. 371 U.S. at 490 n.17. The full passage from Professor Williams reads as follows:

> [T]he accomplice may no longer have anything to fear or hope [or] may mistakingly entertain such fear or hope, or he may wish by his evidence against others to gratify some spite against them. And the circumstances make it peculiarly easy for him to do this, because as a confederate he knows the inner story of what has happened, and it is easy for him to tell this story with a large amount of truth while implicating in it one who is perhaps innocent.

G. Williams, The Proof of Guilt 112 (1st ed. 1955).

Monaco, 735 F.2d 1173 (9th Cir. 1984); United States v. Mills, 704 F.2d 1553, 1565 (11th Cir. 1983), cert. denied, 104 S. Ct. 3517 (1984); United States v. Riley, 657 F.2d 1377 (8th Cir. 1981), cert. denied, 459 U.S. 1111 (1983); United States v. Palumbo, 639 F.2d 123, 127-28 (2d Cir.), cert. denied, 454 U.S. 819 (1981); United States v. Sarmiento-Perez, 633 F.2d 1092 (5th Cir. 1981), cert. denied, 459 U.S. 834 (1982); United States v. Oliver, 626 F.2d 254 (2d Cir. 1980); United States v. Love, 592 F.2d 1022, 1025-26 (8th Cir. 1979); United States v. Bailey, 581 F.2d 341 (3d Cir. 1978); United States v. Lilley, 581 F.2d 182, 187-88 (8th Cir. 1978); United States v. Turner, 475 F. Supp. 194 (E.D. Mich. 1978); United States v. McClendon, 454 F. Supp. 960, 962 (W.D. Pa. 1978); see also Oliver v. Green, 668 F.2d 421, 427 n.11 (8th Cir.), cert. denied, 456 U.S. 1009 (1982).

These recent federal decisions reflect the sound judgment that the portion of an arrestee's custodial statement that implicates another is not a declaration against interest. The Court of Appeals for the Fifth Circuit has put the matter well:

> This was not a spontaneous declaration made to friends and confederates but a custodial confession, given under potentially coercive circumstances that could not at trial--and cannot now--be adequately examined. . . . There were, in addition, obvious motives for falsification--the very natural desire to curry favor from the arresting officers, the desire to alleviate culpability by implicating others, the enmity often generated in a conspiracy gone awry, the desire for revenge, all might lead an arrestee-declarant to misrepresent or to exaggerate the role of others in the criminal enterprise. . . . From these circumstances . . . it is reasonable to suppose that this declarant . . . might well have been motivated to misrepresent the role of others in the criminal enterprise, and might well have viewed the statement as a whole . . . to be in his interest rather than against it.

United States v. Sarmiento-Perez, supra, 633 F.2d at 1102 (emphasis in original).

B. State Precedents

State courts have also overwhelmingly concluded that custodial accusations are inadmissible hearsay. In six states, such declarations are excluded from evidence by statutory rule.[16] In eleven other states, courts have expressly held that such declarations do not come within the penal-interest exception.[17] And in nineteen

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16 Ark. Evid. Rule 804(b)(3); Florida Evid. Code § 90.804(2)(C); Maine Evid. R. 804(b)(3); Nev. Rev. Stat. 51.345(2); N.D. Evid. R. 804(b)(3); Vermont Evid. R. 804(b)(3). See also Uniform Rule of Evid. 804(b)(3).

17 State v. Canaday, 141 Ariz. 31, 684 P.2d 912 (Ct. App. 1984); People v. Leach, 124 Cal. Rpt. 752, 541 P.2d 296, 308-12 (1975), cert. denied, 424 U.S. 926 (1976); Crowder v. State, 237 Ga. 141, 227 S.E. 2d 230, 239 (1976); State v. Hoak, 107 Idaho 742, 692 P.2d 1174 (1984); State v. Myers, 229 Kan. 168, 625 P.2d 1111, 1115-16 (1981); Standifur v. State, 64 Md. App. 570, 497 A.2d 1164 (1985); People v. Handley, 135 Mich. App. 51, 352 N.W. 2d 343, 349-50 (1984); State v. Hansen, 312 N.W. 2d 96, 100-02 (Minn. 1981); State v. Self, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975); People v.
[cont'd on next page]

states and in the District of Columbia, custodial accusations have been excluded under the familiar rule that a co-defendant's post-conspiracy statement is inadmissible against a defendant.[18] In fact, there seems to be only one state court

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Trice, 476 N.Y.S. 2d 402, 404-05 (1984); State v. Young 5 Ohio St. 3d 221, 450 N.E. 2d 1143, 1149 (1983) (Celebrezze, C. J., concurring).

18 Guntharp v. State, 54 Ala. App. 363, 308 S.2d 722 (1974); Eubanks v. State, 516 P.2d 726, 730 (Alaska 1973); Dumas v. United States, 483 A.2d 301, 303 (D.C. App. 1984); State v. Pastushin, 58 Hawaii 299, 568 P.2d 504, 506 (1977); People v. Bolla, 114 Ill. App. 3d 442, 448 N.E. 2d 996, 1004 (1983); Patton v. State, 175 N.E. 2d 11, 13 (Ind. 1961); Napier v. Commonwealth, 515 S.W. 2d 615 (Ky. 1974); State v. Dupree, 377 S.2d 328 (La. 1979); State v. Tate, 658 S.W. 2d 940, 946-47 (Mo. App. 1983); State v. Watson, 182 Neb. 692, 157 N.W. 2d 156, 159 (1968); State v. Clapp, 94 N.H. 62, 46 A.2d 119, 120 (1946); State v. Haskell, 100 N.J. 469, 495 A.2d 1341, 1346 (1985); State v. Fox, 274 N.C. 277, 163 S.E. 2d 492, 502 (1968); Hazelwood v. Oklahoma City, 430 P.2d 852, 853 (Okla. Ct. Crim. App. 1967); Commonwealth v. McDowell, 460 Pa. 474, 333 A.2d 872 (1975); White v. State, 497 S.W. 2d 751, 754 (Tenn. Ct. App. 1973); Lewis v. [cont'd. on next page]

decision upholding the admission of such a custodial declaration. See People v. Moore, 693 P.2d 338 (Colo. App. 1984).

Especially noteworthy is that New Mexico is among those states that have held such declarations inadmissible under the penal-interest exception. See State v. Self, 88 N.M. 37, 536 P.2d 1093 (Ct. App. 1975). There, the New Mexico Court of

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State, 521 S.W. 2d 609, 610 (Tex. Ct. Crim. App. 1975); State v. McLaughlin, 22 Utah 2d 321, 452 P.2d 875, 876 (1969); Berger v. Commonwealth, 217 Va. 332, 228 S.E. 2d 559, 560 (1976); Commonwealth v. White, 370 Mass. 703, 352 N.E. 2d 904, 909 (1976).

Other states have excluded co-defendant confessions on constitutional grounds without discussing state evidentiary principles. See State v. Waterbury, 307 N.W. 2d 45, 49 (Iowa 1981); Langston v. State, 373 S.2d 611 (Miss. 1979); State v. Powers, 198 Mont. 289, 645 P.2d 1357, 1363 (1982); State v. Pacheco, 481 A.2d 1009, 1017-19 (R.I. 1984); State v. LaBarge, 275 S.C. 168, 268 S.E. 2d 278, 280 (1980); State v. Abourezk, 359 N.W. 2d 137 (S.D. 1984); see also Virgil v. State, 84 Wisc. 2d 166, 267 N.W. 2d 852, 862-63 (1978) (co-defendant's confession admissible under penal-interest exception but not under constitution)(citing Douglas).

Appeals excluded an extrajudicial statement in which the declarant said that he had obtained a stolen gun from the defendant. The Court wrote:

> [T]he identification of the defendant as the person from whom [the declarant] obtained the gun is irrelevant to the subjection of [the declarant] to any criminal liability . . . [A]ll that is necessary is that [the declarant] be in possession of a gun that he knew to be stolen. . . . [T]he identity of the donor of the gun and/or identity of the person who stole it has no bearing on the very issue which makes the [declarant's] statement admissible, i.e. his subjection to criminal liability. Conversely, the portion of the statements which are against his interest are irrelevant to the prosecution of the defendant.

536 P.2d at 1097-1098. The decision is Self was not cited to the court below. (App. 26-47). Had it been, we submit, Boeglin's confession would have been excluded on an independent state-law ground.[19]

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19 Amici recognize that "when it is not clear from the opinion itself that the state court relied upon an adequate and [cont'd. on next page]

C. Commentators

Evidence scholars have also concluded that an accomplice's custodial accusation is inadmissible hearsay. Most notable is the position of Dean Wigmore, who favored an expansive penal-interest exception, see 5 Wigmore, Evidence §§ 1455-1477 (Chadbourn rev. 1974), but recognized that a co-defendant's confession did not fall within the exception. Id. § 1477. Wigmore observed that the interest of an arrestee in

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independent state ground," this Court will generally "assume that there are no such grounds." Michigan v. Long, 103 S. Ct. 3469, 3476 (1983). This case, however, may be an appropriate occasion to do otherwise. Id. at 3476 n.6. If, as we believe, New Mexico would exclude Boeglin's declaration under its hearsay rules, this Court will be spared a constitutional determination that would be wholly advisory. Moreover, a clear ruling on the state evidentiary issue might inform this Court's constitutional decision. See Ohio v. Roberts, 448 U.S. 56, 66 (1980); Dutton v. Evans, supra, 400 U.S. at 87-88. Accordingly, the Court may wish to remand this case to the New Mexico Supreme Court to determine whether Boeglin's statement is admissible under state law.

obtaining leniency "by confessing and betraying his co-criminals is in such cases usually so important that . . . that statement would not even under the [penal interest] exception be admissible." Id. at 358 n.1.

Other authorities have shared this sound view. See Louisell and Mueller, Federal Evidence § 427 at 348 (statements "deliberately inculpating other conspirators and knowingly made to law enforcement agents . . . [are] but rank hearsay with no assurance of reliability"); Weinstein's Evidence ¶ 804(b)(3)[03] at 804-150-157; Jefferson, Declarations Against Interest, 58 Harv. L. Rev. 1, 57-63 (1944); Davenport, The Confrontation Clause and the Co-conspirator Exception in Criminal Prosecutions: A Functional Analysis, 85 Harv. L. Rev. 1378, 1396 (1972)("the naming of another as a compatriot will almost never be against the declarant's own interest and

thus will contain little assurance of reliability on this ground"); see also McCormick on Evidence (3d ed.) § 280 at 826 (attaching "particular significance" to fact that declarant was in custody).[20]

D. Petitioner's Cases

The cases that petitioner cites are not to the contrary. (N.M. Br. 22-23). In State v. Parris, 98 Wash. 2d 140, 654 P.2d 77 (1982), the hearsay declarations that were admitted "were all made in furtherance

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20 Accord: Note, Inculpatory Statements Against Penal Interest and the Confrontation Clause, 83 Col. L. Rev. 159, 164-68 (1983); Note, Inculpatory Declarations Against Penal Interest and the Co-Conspirator Rule under the Federal Rules of Evidence, 56 Ind. L. J. 151, 168-71 (1980); Note, Federal Rule of Evidence 804(b)(3) and Inculpatory Statements Against Penal Interest, 66 Cal. L. Rev. 1189, 1210 (1978); Note, Declarations Against Penal Interest, 56 B.U.L. Rev. 148, 167-68 (1976); Note, Declarations Against Interest--Rules of Admissibility, 62 Nw. U.L. Rev. 934, 946-49 (1968).

of the criminal act," "contained no express assertion about past fact," and were not made while the declarant was "in custody and had reason to involve another in order to curry favor." 654 P.2d at 83. Similarly, in State v. Barber, 38 Wash App. 758, 689 P.2d 1099 (Wash. App. 1984), the declarant was not in custody and his challenged statements "were spontaneous in the sense that he volunteered the information without being questioned." 689 P.2d at 1105. Likewise, in United States v. Katsougrakis, 715 F.2d 769, 773-79 (2d Cir. 1983), cert. denied, 464 U.S. 1040 (1984), and United States v. Layton, 720 F.2d 548, 558-61 (9th Cir. 1983), cert. denied, 465 U.S. 1069 (1984), the declarations were not made in custody to a "police officer or other government agent whose favor [the declarant] might be expecting to curry," 715 F.2d at 775, but to a close friend or confidant. And in State v. Hoak, 107 Idaho 742, 692

P.2d 1174 (1984), a hearsay statement was excluded precisely because it was made in response to police interrogation and to gain lenient treatment. 692 P.2d at 1179-80.[21]

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21 Nor is petitioner's argument advanced by its curious reliance upon this Court's decisions in United States v. Wade, 388 U.S. 218 (1967), and Manson v. Braithwaite, 432 U.S. 98 (1977). (N.M. Br. 18). Those cases, of course, hold that a witness who has been exposed to suggestive identification may nonetheless testify if his identification is independently reliable. But, as this Court has recently emphasized, critical to those rulings is the fact that the witness's testimony will be subjected to "the time-honored process of cross- examination[,] the device best suited to determine the trustworthiness of testimonial evidence." Watkins v. Sowders, 449 U.S. 341, 349 (1981). Accord, Manson v. Braithwaite, supra, 432 U.S. at 114 n.14. Surely, such cases lend no support to the notion that a stationhouse accusation untested in the courtroom is reliable evidence of criminal guilt.

Also inapposite is petitioner's citation to United States v. Harris, 403 U.S. 573 (1970)(plurality opinion). (N.M. Br. 21-22). There, Chief Justice Burger relied upon an informant's tip, which was against the informant's penal interest, to find probable cause for a search warrant. But the Chief Justice emphasized (i) that the tip was trustworthy because it

[cont'd. on next page]

Perhaps recognizing the frailty of its position, petitioner devotes much of its brief to attacking the dicta in the New Mexico Supreme Court's opinion. (N.M. Br. 14-16). Specifically, petitioner argues that the New Mexico Court erred in stating that the Confrontation Clause permits the introduction of an out-of-court declaration only if it was "made at an earlier judicial proceeding where the defendant was given the opportunity to fully cross-examine the witness against him." State v. Earnest, 103 N.M. 95, 703 P.2d 872, 876 (1985). This statement, we agree, sweeps too broadly--for it would preclude reliance upon business records, dying declarations, and co-conspirator declarations, which in most

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implicated "property" and was not an "accusation of another" and (ii) that the Confrontation Clause was not implicated since a search warrant application, by nature, is an ex parte proceeding. 403 U.S. at 583-84.

instances are constitutionally admissible. See Ohio v. Roberts, 448 U.S. 56, 66 & n.8 (1980).

This Court, however, "reviews judgments, not statements in opinions." Black v. Cutter Laboratories, 351 U.S. 292, 297 (1956). Moreover, whatever its language, the New Mexico Court's practice is consistent with this Court's jurisprudence. That Court does not interpret the Confrontation Clause to exclude extrajudicial declarations that bear sufficient indicia of reliability to promote a fair trial. See, e.g., State v. Quintana, 98 N.M. 17, 644 P.2d 531 (1982)(dying declaration); State v. Robinson, 94 N.M. 693, 616 P.2d 406 (1980)(excited utterance); State v. Rondeau, 89 N.M. 408, 553 P.2d 688 (1976) (co-conspirator declaration); see also State v. Owens, 703 P.2d 898 (N.M. App. 1984).

III. BOEGLIN'S ACCUSATION HAS NO SPECIAL CLAIM TO RELIABILITY

Contrary to petitioner's claim, Boeglin's hearsay declaration is indistinguishable from the thousands of custodial accusations that courts have found too unreliable to support a criminal conviction.

First, like most such statements, Boeglin's "confession" minimized his own involvement in the crime and pinned responsibility for its commission elsewhere. While acknowledging that he went along with the plan and even tried to harm the victim, Boeglin told the authorities that his efforts had failed and that Earnest had inflicted the fatal wound.[22]

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[22] Notably, Boeglin implicated Earnest, whom he had just met, and not Conner, his drug source, in the killing.

Second, the record makes plain that Boeglin was actively attempting to gain favorable treatment from the police. "Terrified" and uncounseled, he was looking to cut a "deal" that would gain him immunity or, at the least, a short term in the county jail. His motives for currying favor were substantial. Not only did he fear that his parole would be violated because of his drug abuse, but he was under arrest for a capital offense.[23] In these circumstances, the fact that he received no express promises is irrelevant, since "[i]t is a common belief that cooperation with the government will tend to ingratiate a person with the authorities." United States v. McClendon, supra, 454 F. Supp. at 962.

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[23] Under New Mexico law, felony murder is a capital offense, NMSA 30-2-1(A)(2), and a defendant's cooperation with authorities is a mitigating circumstance. NMSA 31-20A-6(H).

Third, Boeglin's conduct, both before and after his custodial accusation, underscores his untrustworthiness. A convicted felon, he was addicted to methamphetamine, a powerful narcotic that induces paranoia and distorts judgment.[24] His account of the events changed with his circumstances: he first told the authorities that he knew nothing of the murder; then that he had "barely" cut Eastman's throat; and at his own trial, that he was innocent of wrongdoing and coerced into participation. On this record, had Boeglin testified at Earnest's trial, he would have been a "corrupt source," whose testimony the jury would have been instructed to scrutinize closely. Cf. Devitt and Blackmar, Federal Jury Practice and Instructions § 17.06; Crawford v. United

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[24] See Lewis (ed.), Modern Drug Encyclopedia, pp. 578-79 (1981).

States, 212 U.S. 183, 204 (1909). His hearsay account can hardly claim a better status.

Finally, as the trial judge recognized, supra at pp. 8-9, Boeglin's statement constituted the only evidence directly linking Earnest to the crime. The State's "corroboration" was entirely peripheral. Earnest's fingerprints were not found on the murder weapon; the nitrate test was negative; Conner's testimony exculpated him; and the medical evidence, while detailing the cause of death, was silent as to who bore responsibility for it. Absent cross-examination, there was simply no way to determine with confidence whether Boeglin was telling the truth, or a story "with a large amount of truth [but] implicating in it one who [was] perhaps quite innocent" of the crime. G. Williams, supra, at 112.

In sum, this case presents no occasion for departing from the long-standing rule

that under our system a criminal defendant cannot be convicted on the untested declaration of such an accuser.[25]

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[25] Two other considerations support affirmance. First, were the law to permit the introduction of such custodial accusations, a criminal defendant would be sorely disadvantaged. He would generally have no access to the relevant facts to demonstrate that his co-defendant's statement was involuntarily obtained or otherwise unreliable. Here, for example, the full facts surrounding Boeglin's confession--e.g., his methamphetamine "high," the isolation cell, and his motive for "dealing"--were developed only at Boeglin's own trial. See supra, pp. 2-6.

Second, under existing law, a prosecutor can virtually ensure that a co-defendant, like Boeglin, who has made a custodial accusation, will be unavailable to testify at a defendant's trial. The prosecution need only delay the co-defendant's case so that he still faces charges when the defendant, whom he has implicated, comes to trial. In such circumstances, the co-defendant has little alternative but to invoke his Fifth Amendment privilege. Where the prosecution may so readily set the stage to deny the prospect of cross-examination, a rule permitting the introduction of hearsay is particularly undesirable. Cf. Motes v. United States, 178 U.S. 458 (1900).

CONCLUSION

This case is potentially of far-reaching importance to the fair administration of criminal justice in this nation. If this Court reaches the merits,[26] we believe that affirmance of the decision below is required under any sound construction of the Confrontation Clause. Whatever the full sweep of that Clause, it plainly does not permit the state to gain a criminal conviction on the basis of evidence so fundamentally suspect as the stationhouse accusation that was crucial to the prosecution here. If respondent is to spend his life in a New Mexico prison, it should be only after "testimony introduced in the regular way, so as to give him the opportunity to cross-examine the witness or

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[26] See supra, p.34 n.19.

witnesses." Brown v. United States, supra, 150 U.S. at 99 (emphasis added). Any other ruling, we submit, would rob the Confrontation Clause of its central meaning.

For these reasons, the judgment of the New Mexico Supreme Court should be affirmed.

Respectfully submitted,

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ADDENDUM

PUBLIC DEFENDER DEPT.
CARLSBAD NM

FIFTH JUDICIAL DISTRICT
STATE OF NEW MEXICO
COUNTY OF EDDY
FILED AUG 12 1993 IN MY OFFICE
FRANCES M. WILCOX
Clerk of the District Court

IN THE DISTRICT COURT OF EDDY COUNTY

STATE OF NEW MEXICO

STATE OF NEW MEXICO, Plaintiff,	:	NM Court of Appeals No.: 5983 Eddy County Cause No.:
VS.	:	CR-82-17
PHILLIP BOEGLIN, Defendant.	:	COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

THE ABOVE MATTER having again come on for consideration by the Court, and the Court having reviewed the transcript of the proceedings held September 29th and 30th, 1982, and in accordance with the decision and Mandate of the Court of Appeals of the State of New Mexico entered in case number 5983, and the Court makes the following Findings of Fact and Conclusions of Law, and the Requested Findings of Fact and Conclusions of Law submitted by the respective parties which are not incorporated herein or are inconsistent with the Court's Findings, are deemed denied and refused.

FINDINGS OF FACT

1. On February 12, 1982, during the early morning hours, the body of David A. Eastman was found in a bar ditch beside State Road No. 31, Eddy County, New Mexico.

2. The injuries to David A. Eastman appeared to consist of two bullet wounds to the head and a slashed throat.

3. Following the discovery of David A. Eastman's body, Defendant, Phillip C. Boeglin, Ralph R. Earnest and Perry L. Connor were arrested while driving the victim's El Camino in the City of Carlsbad, New Mexico.

4. Following the arrest of Defendant, Phillip C. Boeglin, Ralph R. Earnest and Perry L. Connor, the three men were transported to the Eddy County Sheriff's Department Sub-Station where they were advised of their Miranda Rights.

5. At approximately 9:00 a.m., August 12, 1982, Defendant, Phillip C. Boeglin, was taken to the office of the District Attorney to be interviewed by Denis DeLuche, District Attorney Investigator, Captain Ray Ahlstrom, Eddy County Sheriff's Department, and Deputy Eddie Carrasco, Eddy County Sheriff's Department.

6. Prior to the commencement of the 9:00 a.m. interview, the Defendant, Phillip C. Boeglin, was advised of his Miranda Rights by Mr. DeLuche.

7. Following advise of rights, the Defendant did indicate that he understood those rights and did express a desire to have an attorney, "yeah, I guess I better get an attorney." The interview by Mr. DeLuche was terminated at 9:07 a.m.

8. Thereafter, Mr. DeLuche stopped the tape recording of the interview with Defendant. Defendant was not taken from the interview room; he remained there with Deupty Sheriff Ray Ahlstrom.

9. No one sought a lawyer for the Defendant or attempted to assist him in contacting an attorney.

10. Deputy Ahlstrom entered into "casual" conversation with Defendant at that point. He said some of the events that had happened in the previous hours were discussed, the Deputy telling the Defendant to tell us the truth.

11. Approximately 13 minutes after Defendant had advised he wanted an attorney, at 9:20 a.m., the interrogation of Defendant was continued. It was not initiated by the Defendant and the statement given by Defendant did not in any way incriminate himself, and he repeatedly denied any involvement with the victim and the events being investigated.

12. Thereafter, the Defendant was booked and processed into the Eddy County Jail at approximately 10:00 to 10:30 a.m.

13. During the booking process, Defendant reiterated that he needed an attorney and was permitted to make a telephone call to the office of a local private attorney.

14. Defendant did not speak directly to the attorney but relayed his request to obtain counsel to the secretary in the attorney's office.

15. Shortly after 1:15 p.m., a message was received from the attorney's office that he would represent Defendant if he received $10,000.00 "up front cash." A jailer relayed this information to Defendant because a co-defendant was present where the telephone was located at the time of the call.

16. Defendant indicated that he could not afford that amount of money and cursed.

17. Sometime during the early afternoon of February 12, 1982, the Defendant initiated an interview with Investigator DeLuche requesting that Jailer Maxwell contact the District Attorney's Office because the Defendant desired to speak with the Investigator.

18. Jailer Maxwell did contact the Office of the District Attorney and inform them of the Defendant's desire to talk to them.

19. At 3:13 p.m., Investigator DeLuche and Deputy Eddie Carrasco did meet with the Defendant pursuant to his request.

20. Investogator DeLuche did inquire of the Defendant as to whether or not he desired to talk to them at that time. After receiving an affirmative response, Investigator DeLuche inquired of the Defendant as to whether or not he recalled his rights and then proceeded to readvise him of his rights.

21. Investigator DeLuche did specifically inform the Defendant that if he could not afford an attorney one would be appointed for him free of charge, ". . .doesn't cost you anything."

22. Following being advised of his rights, the Defendant did knowingly, intelligently and voluntarily waive his right to counsel and proceed to answer questions by Investigator DeLuche.

23. At no time during the interview, beginning at 3:13 p.m. and ending at 3:54 p.m., which was initiated by the Defendant, did the Defendant express a desire to terminate the interview or invoke any of his rights or request an attorney.

24. Following the conclusion of the afternoon interview, the Defendant did indicate a willingness to voluntarily accompany the officers to recover the weapons used in the murder of David A. Eastman, the Defendant did accompany the officers voluntarily knowing his Miranda Rights and intelligently, knowingly and voluntarily waiving those rights.

25. A knife, gun and watch were recovered with the

Defendant's assistance.

26. Following the recovery of the evidence, the Defendant was returned to the Eddy County Sheriff's Sub-Station and then transported to the Artesia detention facility.

27. At 10:20 p.m. on February 12, 1982, Deputy Eddie Carrasco and Deputy Gary McCandless of the Eddy County Sheriff's Department did conduct an interview with the Defendant, which was initiated by the Deputies, not the Defendant.

28. Prior to the commencement of the interview, the Defendant once again was advised of his rights, after the Defendant confirmed that he had earlier been advised of his rights on numerous occasions.

29. As to the statement given on the afternoon of February 12, 1982 commencing at 3:13 p.m., the Defendant did initiate the interview with law enforcement officials and did request to speak with them regarding the Eastman homicide, and did knowingly, intelligently and voluntarily waive all rights, including the right to counsel.

CONCLUSIONS OF LAW

1. Defendant, Phillip C. Boeglin, did not initiate the conversation, which was continued after requesting counsel and which consultation commenced at 9:20 a.m. the morning of February 12, 1982, and notwithstanding that such statement was exculpatory, it should be suppressed.

2. The Defendant did knowingly, intelligently and voluntarily waive his rights, specifically including his right to counsel, and did initiate contact with law enforcement officials at his request prior to giving the statement, which commenced at 3:13 the afternoon of February 12, 1982, and Defendant's Motion to Suppress this statement should be denied.

3. The Defendant did not initiate the conversation, which commenced at 10:20 p.m. in Artesia, New Mexico on the evening of February 12, 1982, and, therefore, Defendant's statement given at that time should be suppressed.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant's Motion to Suppress the statement given by the Defendant, which commenced ~~at~~ 9:20 a.m. February 12, 1982, and the statement, which commenced at 10:20 p.m. in Artesia, New Mexico on February 12, 1982 is granted and these two statements of the Defendant are hereby ordered suppressed.

The Defendant's Motion to Suppress the statement given by Defendant, which commenced at 3:13 p.m. February 12, 1982 be, and the same is hereby, denied, and such statement is not ordered suppressed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Defendant's Motion to Suppress Physical Evidence, which was recovered by the officers on the afternoon of February 12, 1982, being the knife, gun and watch, covered by Findings of Fact Number 24 and 25 above, should be denied and no order suppressing such

physical evidence is made.

Defendant be, and hereby is, granted leave to file an Interlocutory Appeal of this Order to the extent that his Motions to Suppress are denied.

JOHN B. WALKER
District Judge

xc: District Attorney
Public Defender

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs. No. 7374

PHILLIP BOEGLIN,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY

John B. Walker, Judge

Paul Bardacke, Attorney General
William McEuen, Assistant Attorney General
Santa Fe, New Mexico

Attorneys for Plaintiff-Appellee

COURT OF APPEALS OF NEW MEXICO
FILED
NOV 15 1983

Janet Clow, Chief Public Defender
Santa Fe, New Mexico

Attorney for Defendant-Appellant

MEMORANDUM OPINION

NEAL, Judge

This appeal results from our remand of this cause in State v. Boeglin, ____N.M.____, 666 P.2d 1274 (Ct.App.1983).

Defendant has appealed the trial court's failure, on remand, to suppress two of his statements and raises the additional issue of whether the trial court erred in failing to hold an evidentiary hearing. We granted defendant's application for interlocutory appeal and proposed summary affirmance on the issues raised with regard to the first statement and summary reversal on the trial court's failure to suppress defendant's afternoon statement. The State opposed our proposed disposition of this matter. Not being persuaded, however, we reverse on this [illegible]. No memorandum in opposition having been filed by defendant, the denial of [illegible] to suppress [illegible] statement is affirmed. The [illegible] issue need [illegible]

The facts of this case were set forth in State v. Boeglin and therefore will not be repeated here. Defendant claims that his afternoon statement should have been suppressed because the record contained no evidence of a knowing, intelligent and voluntary waiver of his previously invoked right to counsel. We agree with the defendant that his afternoon statement resulted from questions by the interrogating officers designed to elicit incriminating responses. State v. Dominguez, 97 N.M. 592, 642 P.2d 195 (Ct.App.), cert. quashed, 96 N.M. 17, 627 P.2d 412 (1982); State v. Edwards, 97 N.M. 141, 637 P.2d 572 (Ct.App.), cert. denied, 97 N.M. 621, 642 P.2d 607 (1981).

As we stated in State v. Boeglin, "[w]aiver is an intentional abandonment of a known right." We believe that defendant's response to the advice of his right to free counsel -- "Okay, 10,000 dollars up front" -- indicated his lack of understanding of his right to free counsel. There is nothing in the record to controvert this inference.

The testimony of the interrogating officer does not present a conflict with this inference in that the officer never testified that defendant understood his right to free counsel. He only testified that he did not have any indication that defendant did not understand the words that he was using during the advice of rights. Nor do we believe that the the fact that defendant was advised of his right to free counsel on two occasions is sufficient to demonstrate a knowing, intelligent and voluntary waiver. Proof of the State's contention that defendant had had prior contact with law enforcement authorities not being before this Court, we cannot consider this contention of the State. State v. Paul, 82 N.M. 629, 485 P.2d 375 (Ct.App.), cert. denied, 82 N.M. 601, 485 P.2d 357 (1971).

In both appellate courts and trial courts, there is a presumption against [illegible] of a constitutional right. State v. Boeglin, State v. [illegible], 72 N.M. 347, [illegible] burden [illegible] voluntarily [illegible] State v. Boeglin. Here [illegible]

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consider several circumstances concerning defendant's waiver of his right to free counsel. We consider the fact that defendant's answer to the advice of his right to free counsel indicated an obvious lack of understanding, and the fact that defendant had injected himself with methamphetamine earlier that day and appeared virtually "terrified" during his morning interview. We also consider the fact that defendant was not informed, when he indicated his inability to pay for counsel, that an attorney would be made available free of charge. Compare State v. Carlton, 83 N.M. 644, 495 P.2d 1091 (Ct.App.), cert. denied, 83 N.M. 631, 495 P.2d 1078 (1972). When a defendant has indicated his desire for counsel, and his inability to pay for it becomes obvious, as does his lack of comprehension of the availability of free counsel, the spirit of Miranda [Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966)] makes it the responsibility of those charged with his custody to remind defendant of his right to free counsel. Here, there was no such reminder. The interrogating officer never really knew whether defendant understood his right to free counsel or not. His testimony was equivocal. Rather than relying on such equivocal testimony to overcome a totality of circumstances which seems to us to indicate complete lack of understanding of the right to free counsel, we hold the State to its heavy burden, established in our cases.

We hold that the record lacks sufficient evidence to support a finding of an effective waiver of right to counsel. We reverse the trial court's order denying suppression of defendant's afternoon statement and affirm its order regarding the first statement.

IT IS SO ORDERED.

C. Fincher Neal, Judge

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